STATE OF MICHIGAN
IN THE SUPREME COURT
ON APPEAL FROM THE MICHIGAN COURT OF APPEALS
AND THE OAKLAND COUNTY CIRCUIT COURT

STEVEN ILIADES and JANE ILIADES,

Plaintiffs-Appellees,

SCt No.
COA No. 324726
LC No. 12-129407-NP

v.

DIEFFENBACHER NORTH AMERICA, INC,

Defendant-Appellant.

APPLICATION FOR LEAVE TO APPEAL ON BEHALF OF DEFENDANT DIEFFENBACHER NORTH AMERICA, INC.

NOTICE OF HEARING FOR SEPTEMBER 27, 2016

COURT OF APPEALS OPINIONS DATED JULY 19, 2016, CIRCUIT COURT ORDER DATED SEPTMEBER 17, 2014, MOTION TRANSCRIPT DATED SEPTMEBER 17, 2014, AND CIRCUIT COURT DOCKET ENTRIES ATTACHED TO STATEMENT IDENTIFYING OPINION BEING APPEALED AND RELIEF SOUGHT

EXHIBITS

PROOF OF SERVICE

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Dated: August 30, 2016

STATE OF MICHIGAN

IN THE SUPREME COURT
ON APPEAL FROM THE MICHIGAN COURT OF APPEALS
AND THE OAKLAND COUNTY CIRCUIT COURT

STEVEN ILIADES and JANE ILIADES,

Plaintiffs-Appellees,

SCt No.
COA No. 324726
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v.

DIEFFENBACHER NORTH AMERICA, INC.,

Defendant-Appellant.

_____/

NOTICE OF HEARING

Please take notice that the Application for Leave to Appeal on Behalf of the Defendant Dieffenbacher North America, Inc. will be brought for hearing before the Michigan Supreme Court on September 27, 2016, at a time to be set by the Court.

By: /s/ Michelle A. Thomas

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STATEMENT IDENTIFYING OPINIONS AND ORDERS BEING APPEALED AND RELIEF SOUGHT

Defendant Dieffenbacher North America, Inc., seeks Supreme Court review and reversal of an Opinion of the Michigan Court of Appeals dated July 19, 2016 (copy attached) which reverses an Order entered by the Oakland County Circuit Court on September 17, 2014 granting summary disposition pursuant to *MCR 2.116(C)(10).*

The Circuit Court granted summary relief on the basis that the Defendant product manufacturer is entitled to invoke an absolute legal defense set forth under *MCL §600.2947(2)* and *MCL §600.2945(e)* given undisputed evidence that Plaintiff Steven Iliades engaged in unreasonable and unforeseeable product misuse (copy of 9/17/14 Order attached along with copies of the 9/17/14 Motion Transcript and the Circuit Court docket entries).

In a divided opinion reversing the Circuit Court's construction and application of *§2947(2)* and *§2945(e),* the two member majority held that the Defendant manufacturer should have foreseen that, while acting during the course of employment as an industrial press operator, Iliades would intentionally disregard safety training and instructions by partially climbing into an operational press to retrieve wayward finished parts without first manually shutting down the press. The majority panel reasoned that, as a matter of law and public policy: the refusal of product users to obey safety training, warnings or instructions does not constitute *per se* product misuse; and, ordinary negligence on the part of product users is *per se* foreseeable.

The majority opinion directly conflicts with four previous Court of Appeals' opinions which held that the civil liability of products manufacturers is negated, as a matter of law, where the evidentiary record establishes that the particular product use diverged from common practice, violated safety instructions and training provided to the user, and was hazardous under any standard of reasonableness. *Citizens Ins Co of Am v Prof'l Temperature Heating & Air Conditioning, 2012 Mich App LEXIS 2140 (No 300524, 10/25/12,* **Ex 32***), lv den, 493 Mich 954;*

828 NW2d 368 (2013)[1]*; Walton v Miller, 2011 Mich App LEXIS 1734 (No 293526, 10/4/11,* **Ex 33***); Fjolla v Nacco Materials Handling Group, 2008 Mich App LEXIS 2432 (No 281493, 12/9/06,* **Ex 34***); Davis-Martinez v Brinks Guarding Servs, 2005 Mich App LEXIS 2824 (No 261941, 11/15/05,* **Ex 35***).*

The specific issues presented in this Application for Leave:

- when enacting *1995 PA 249, MCL §§600. 2947(2)* and *2945(e)* as part of a package of tort reform legislation, did the Michigan Legislature intend to provide product manufacturers with an absolute legal defense premised upon evidence of unforeseeable product misuse; and, if so,
- what evidence is necessary and sufficient to establish unforeseeable product misuse.

To date, no appellate decision with precedential value currently resolves these critical issues regarding the proper construction and application of *MCL §600.2945(e)* and *MCL §600.2947(2)*.

Specifically, the existing Court of Appeals' opinions regarding judicial enforcement of the statutory product misuse defense, including the opinion in this case, are unpublished[2] and, hence, do not operate, either individually or collectively, as binding authority. *MCR 7.215(C)(1); Aroma Wines & Equip v Columbian Distrib Service, Inc., 497 Mich 337, 356, n 50; 871 NW2d 136 (2015).*

[1] When the Court denied leave in *Citizens Ins Co of Am, supra,* the existing, albeit unpublished Court of Appeals decisions provided consistent construction and application of *1995 PA 249, MCL §§600. 2947(2)* and *2945(e)* thus obviating the need for intervention by the State's highest court.

[2] In *Greene v A. P. Prods, 284 Mich App 391, 408-410; 691 NW2d 38 (2004),* the Court of Appeals held that *MCL §600.2947(2)* did not absolve a manufacturer from liability for breach of a duty to warn users of a toxic chemical hair product to keep the consumer product out of the reach of children, reasoning, in part, that a child's ingestion of a the product was reasonably foreseeable. The Supreme Court granted leave, directing to the parties to brief several issues, including the applicability of the misuse defense. *Greene v A. P. Prods, 474 Mich 886; 704 NW2d 702 (2005).* Ultimately, however, the Supreme Court reversed the Court of Appeals and remanded for reinstatement of summary disposition in favor of the manufacturer solely on the open and obvious defense set forth in *MCL §600.2948(2).*

Additionally, being unpublished, the conflict created by the divergent Court of Appeals opinions is not subject to resolution under *MCR 7.215(J).*

The Defendant Dieffenbacher respectfully submits that it now incumbent upon the Supreme Court to review the statutory language at issue and resolve the existing conflict among the Court of Appeals' panels by announcing a definitive test for the judicial construction and application of the product misuse defense set forth under *MCL §600.2945(e)* and *MCL §600.2947(2).*

Obviously, this case is not the last product action that will implicate the statutory unforeseeable misuse defense. Certainly in the context of claims arising out of the manufacture and industrial use of heavy machinery, many similar actions are surely pending, and innumerable future actions will likely be filed, especially given our State's pride in and economic dependence upon a robust manufacturing sector. The Michigan bench, bar, litigants, and other parties genuinely interested in and impacted by product liability law require and deserve sound and reliable guidance regarding the proper judicial construction and application of a critical statutory defense. With this application, the Supreme Court is being offered an opportunity to provide such guidance.

Dieffenbacher also respectfully submits that it is necessary for the Supreme Court to review and reverse the clearly erroneous legal conclusions and analyses appearing in the majority opinion. As will be discussed, the unambiguous language of and legislature history for *MCL §600.2945(e)* and *MCL §600.2947(2)* compel the conclusion that the Michigan Legislature intended product manufacturers to be completely immunized from tort liability where there is evidence that a product user ignored or disobeyed safety training, instructions, warnings and communications in an unforeseeable manner.

In a broader sense, Supreme Court intervention in this case is warranted in order to correct the numerous violations of principles of statutory construction appearing in the majority opinion as enforcement of proper judicial respect for and deference to the Michigan Legislature, especially in areas of public policy such as tort reform legislation is of major significance to the state's overall jurisprudence.

In sum, this case provides an excellent opportunity for the Supreme Court to insure that all state statutes and, in particular, the remedial legislation found in *MCL §600.2945(e)* and *MCL §600.2947(2),* are correctly construed by the Michigan Courts so as to inspire confidence our system of jurisprudence on the part of the specifically interested parties as well as the general public.

Therefore, the Defendant-Appellant Dieffenbacher respectfully requests the Supreme Court to grant its Application for Leave and reverse and vacate the Court of Appeals' majority opinion. This relief can be awarded peremptorily or following further argument and/or briefing on the merits.

STATE OF MICHIGAN

COURT OF APPEALS

STEVEN ILIADES and JANE ILIADES, Plaintiffs-Appellants, v DIEFFENBACHER NORTH AMERICA INC, Defendant-Appellee.	UNPUBLISHED July 19, 2016 No. 324726 Oakland Circuit Court LC No. 12-129407-NP

Before: RONAYNE KRAUSE, P.J., and JANSEN and STEPHENS, JJ.

PER CURIAM.

In this products liability action, plaintiff appeals by leave granted the trial court's order granting summary disposition in favor of defendant. Plaintiff was a press operator at Flexible Products, Inc., using a press manufactured by defendant and equipped with a safety device called a "light curtain" that was supposed to halt the machine's operation while anything interrupted a beam of light that traversed the press's opening. Plaintiff was injured when he partially entered the press through that opening and the press automatically cycled, crushing him inside. Summary disposition was granted on the theory that plaintiff's conduct was unforeseeable misuse. We agree with plaintiff that unforeseeable misuse was not an appropriate basis for granting summary disposition on this record. Therefore, we reverse and remand.

Flexible Products is a company that makes parts for car manufacturers, including rubber parts created in multi-hundred-ton molding press machines, of which Flexible Products has many. The specific press involved in the accident that gave rise to this case was Press Number 25, which was purchased from defendant in 1994. The presses operated by injecting rubber from the top, and then the press would "cycle," in which upper and lower plates would come together for a time and then open again, whereupon the finished part would be manually removed by the operator. The presses could be set to run manually, but were generally automatic: they would pause for a time to allow part removal and then cycle again on their own unless halted by a safety device. Press Number 25, as with other presses at that time, was originally equipped with a physical safety door to prevent operators from entering the press while it was operating. Defendant replaced the physical doors with light curtains because customers, including Flexible Products, were "so desperate to kept [sic] the presses in production" that they would bypass the doors, which defendant found "scary."

As noted, light curtains operated by passing a beam of light across the opening to the press. If the light curtain detected an interruption to the beam of light, the press would stop moving. The light curtain was *supposed* to prevent any movement of the press while anything was sticking through the press opening. However, this was not always the case. Plaintiff usually worked on Press Number 1, which had a light curtain he deemed overly sensitive. An operator experienced with Press Number 25, however, reported that there was a gap between the light curtain and the press opening on that press, and someone thin enough could even stand between the light curtain and press opening without interrupting the beam, so the press could cycle. That operator found this out to his surprise, and it was apparently unknown to anyone else.

All press operators at Flexible Products were explicitly trained not to rely exclusively on the light curtains and to wait until the press had stopped on its own before removing parts; the trainers, however, conceded that operators were not supposed to actually turn the presses off except in true emergencies, and as a practical matter, no matter what the employees were trained to do, using the light curtain to halt the presses during part removal was the only practical option. Furthermore, operators were required to maintain certain productivity levels, and notwithstanding their training, many operators would remove parts from presses before the presses came to a complete halt to save time. Some of the presses at the time of the accident had been equipped with buttons that needed to be pushed to resume press operation after a light curtain interruption, but Press Number 25 was not so equipped. Presses were equipped with "parts grabbers" for removing finished products without reaching inside the press, but apparently parts did not always come out neatly or fell out of the molds inside the presses.

As noted, plaintiff was unfamiliar with Press Number 25 and was not working at his usual press because there was something wrong with it. The accident occurred after he returned from a break. He had used the press prior to his break with no issues and had used the parts grabber multiple times. He explained that he started operating the press and it

> probably took a minute or two to recycle, came down, some parts fell out. I reached in to grab my parts, grabbed the tool, reached in and grabbed those parts and the press started cycling. It never happened before.

Plaintiff stated that his "left foot never left the platform" but his "right knee leaned in so [he] could reach a little bit further." He clarified that his knee was resting on top of the guard or skirting in front of the press itself. He leaned in between the two molds and through the light curtain area. He indicated that he had, in the past, leaned in farther than that, and he had never been told not to do so. He also testified that he had not pressed any button to restart the press. After the press came down on him, he could not move but he was able to attract the attention of the shift foreman by banging a tool against the side. The press eventually needed to be partially disassembled to extricate him.

Defendant moved for summary disposition on the theory that plaintiff knowingly and intentionally bypassed the light curtain safety device and climbed inside the press, contrary to his training, his employer's rules, and his knowledge of how the press could be safely operated. Plaintiff argued in response that defendant mischaracterized exactly what he did and his actions were foreseeable, noting that there was at least a question of fact as to whether operators were supposed to reach inside the press to remove parts and that he might have leaned in too far, but if

so, the light curtains were expressly intended to prevent the kind of accident that occurred. The trial court agreed with defendant that plaintiff had misused the press and done so in a manner that defendant could not reasonably have foreseen.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all evidence submitted by the parties in the light most favorable to the non-moving party and grants summary disposition only where the evidence fails to establish a genuine issue regarding any material fact. *Id*. at 120. "Whether there was misuse of a product and whether misuse was reasonably foreseeable are legal issues to be resolved by the court." MCL 600.2947(2).

Initially, while we decline to explicitly so decide, we agree with defendant's observation that "misuse" is defined by statute as, in relevant part, "uses contrary to a warning or instruction provided by the manufacturer, seller, or another person possessing knowledge or training regarding the use or maintenance of the product." MCL 600.2945(e). The statute does not appear to dictate any minimal level of egregiousness. Whatever linguistic artistry is employed to characterize his actions, plaintiff's act of partially entering the press in the manner he did appears to have been contrary to instruction provided by his employer. However, as we discuss below, there is at least a genuine question of fact whether he acted within the boundaries of common practice. We therefore decline to decide whether plaintiff did "misuse" the press within the meaning of the statute, but for the purposes of resolving this appeal we do not need to do so. Presuming plaintiff's conduct constituted "misuse," the dispositive issue is whether that conduct was *foreseeable*.

Specifically, the statute at issue is MCL 600.2947(2), which states:

> A manufacturer or seller is not liable in a product liability action for harm caused by misuse of a product unless the misuse was reasonably foreseeable. Whether there was misuse of a product and whether misuse was reasonably foreseeable are legal issues to be resolved by the court.

Unfortunately, foreseeability is not defined by statute, and what definitions exist are not helpful: this Court has observed that it is defined as "'the ability to see or know in advance, hence, the reasonable anticipation that harm or injury is a likely result of acts or omissions.'" *Holloway v Martin Oil Service, Inc*, 79 Mich App 475, 478 n 3; 262 NW2d 858 (1977), quoting *Black's Law Dictionary*, 4th ed. Reasonable foreseeability refers to foreseeability by the manufacturer rather than in the abstract. *Antcliff v State Employees Credit Union*, 95 Mich App 224, 230; 290 NW2d 420 (1980), aff'd 414 Mich 624 (1982).

The evidence strongly indicates that *some* manner of reaching into presses was simply how they operated, and consequently *some* risk of injury is indeed foreseeable. The entire point of the light curtains was, indeed, to prevent exactly that. It is well-established in criminal contexts, when evaluating proximate causation, that "[o]rdinary negligence is considered reasonably foreseeable," whereas "'gross negligence' or 'intentional misconduct,'" generally referring to significant disregard for known hazards or consequences, is not. *People v Feezel*,

486 Mich 184, 195-196; 783 NW2d 67 (2010). In the interests of applying a standard beyond picking and choosing analogies, we draw the same distinction here.

We have found no published cases expressly stating whether or not disobeying instructions, warnings, training, or other safety communications *per se* constitutes unforeseeable misuse. However, in the abstract, it is simply common knowledge that users of all kinds of products tend to disregard safety instructions to a greater or lesser degree. Whether or not they *should* is not the pertinent standard; rather, it is whether the manufacturer should *reasonably expect* it. As a general proposition, manufacturers simply cannot reasonably expect that all instructions will always be followed.

Therefore, we examine this case from the more sensible perspective of whether defendant should have reasonably expected that press operators would rely on the light curtains as exclusive safety devices. It is worth noting that there was clear testimony to the effect that the light curtain installed on Press Number 25 did not work properly and would clear even if something was traversing the press opening, a "surprising" fact known to a regular operator of that press, but plaintiff had never worked on that press before. With that one exception, the testimony was uniform that light curtains had never failed. Furthermore, the testimony that light curtains were not "off switches" was somewhat ambiguous given the more or less contemporaneous testimony from the same witnesses that the light curtains did stop the presses and, indeed, that was their purpose. It appears that the reference was that light curtains did not *shut down* the presses.

We appreciate the irony of being the victim of a safety product actually working too well. However, the evidence shows that press operators were routinely in the habit of disregarding their training by relying on the light curtains to remove finished products from the presses as quickly as possible. The evidence at least raises a genuine question of fact whether finished products could be practically removed from the presses without reaching into them. Plaintiff clearly exposed himself to a risk of a much greater *degree* of harm than merely sticking an arm inside. But the *nature* of that conduct was exactly the same: assuming that he would be protected from the press by the light curtain, a safety device that gave every impression of being reliable. Indeed, plaintiff's testimony suggested that for the most part, the light curtains were if anything *too* sensitive. Furthermore, defendant's electrical engineer testified that defendant was actually aware that clients were bypassing the safety doors that preceded the light curtains in the pursuit of continuing operations; it was thus actually aware that its clients incentivized operational efficiency at the cost of safety.

The evidence shows that plaintiff did not *completely* enter the press, the light curtains were supposed to have kept the press from cycling as long as some part of his body was sticking out of the press opening, and whether or not doing so was wise or even formally permitted, it was common practice to rely on the light curtains as sole safety devices. There is no testimony from any of his co-workers that he would have had reason to know that the light curtain on that particular press would be cleared if one got *between* the light curtain and the press, or that such an occurrence was even possible. We do not find, on this record, that plaintiff obviously

committed gross negligence.[1] In contrast, defendant knew that its customers might bypass safeties if doing so made press operation more efficient and that parts could not be retrieved from the press without *some* amount of entry thereinto. It might be reasonably expected that, in light of Flexible Products being one of defendant's biggest customers, defendant would have some familiarity with how the presses were actually used. It is no great cognitive leap to conclude that defendant should reasonably have anticipated that press operators might reach inside presses and, in so doing, not take the additional time to use any safety features other than the light curtain. As noted, the statute does not set a standard for egregiousness of misuse, but rather foreseeability.[2]

We conclude that it was reasonably foreseeable to defendant that press operators would, however inadvisably and however contrary to instruction, come to rely entirely on the light curtains for safety. The trial court therefore should not have granted summary disposition at this time and on this theory.

Reversed and remanded. We do not retain jurisdiction.

/s/ Amy Ronayne Krause
/s/ Cynthia Diane Stephens

[1] We express no opinion, and none should be deemed implied, as to whether plaintiff did or did not commit any kind of negligence. Furthermore, as noted, we presume that plaintiff misused the press but we likewise do not explicitly decide it.

[2] We understand our dissenting colleague's argument to be that the extent of any misuse affects its fundamental chracter. We respectfully disagree.

STATE OF MICHIGAN

COURT OF APPEALS

STEVEN ILIADES and JANE ILIADES, Plaintiffs-Appellants, v DIEFFENBACHER NORTH AMERICA INC, Defendant-Appellee.	UNPUBLISHED July 19, 2016 No. 324726 Oakland Circuit Court LC No. 12-129407-NP

Before: RONAYNE KRAUSE, P.J., and JANSEN and STEPHENS, JJ.

JANSEN, J. (*dissenting*).

I respectfully dissent. I would affirm the trial court's order granting summary disposition in favor of defendant in this product liability action under the theory that plaintiff's conduct constituted unforeseeable misuse.

The parties dispute whether plaintiff's conduct constituted a misuse of the press and whether his conduct was reasonably foreseeable. The statute at issue in this case, MCL 600.2947(2), provides, "A manufacturer or seller is not liable in a product liability action for harm caused by misuse of a product unless the misuse was reasonably foreseeable. Whether there was misuse of a product and whether misuse was reasonably foreseeable are legal issues to be resolved by the court." Misuse is defined as "use of a product in a materially different manner than the product's intended use." MCL 600.2945(e).

> Misuse includes uses inconsistent with the specifications and standards applicable to the product, uses contrary to a warning or instruction provided by the manufacturer, seller, or another person possessing knowledge or training regarding the use or maintenance of the product, and uses other than those for which the product would be considered suitable by a reasonably prudent person in the same or similar circumstances. [*Id.*]

"Foreseeability of misuse may be inherent in the product or may be based on evidence that the manufacturer had knowledge of a particular type of misuse." *Portelli v IR Constr Prod Co, Inc*, 218 Mich App 591, 599; 554 NW2d 591 (1996).

Plaintiff's action of partially climbing into the press constituted a misuse of the press. The evidence established that plaintiff acted contrary to the instructions provided by a person

with knowledge or training regarding the use of the press. According to plaintiff, he reached into the press to retrieve parts. His torso and back were inside the press. Plaintiff testified during his deposition that his left foot remained on the platform and his right knee "leaned in" onto the guard or the metal skirting on the front of the press so that he could reach further into the press. Plaintiff's conduct was contrary to his training. The type of press used by plaintiff may operate in either manual mode, in which an operator must push a button or move a joystick with regard to every motion made by the press, or automatic mode, in which the operator initiates a cycle and then the press moves without additional actions by the operator. Plaintiff's supervisor, Charles Green, found plaintiff trapped in the press while the press was in automatic mode.

Joe Whiteside, a trainer who worked for Flexible Products for 17 years and who operated a press every day for 15 years, was the person who trained plaintiff. Whiteside trained a number of other people before training plaintiff. Whiteside trained plaintiff never to reach inside the press when it is in automatic mode. Instead, he explained that an operator must put the press in manual mode before going inside it. He explained during his deposition, "There's two main rules. One is to always, whenever you're going inside the press, to ensure that it's on manual . . . ." With regard to the light curtain, Whiteside told plaintiff, "Do not bypass the light curtain." He explained during his deposition that the light curtain is a safety device and that an operator must put the press in manual mode before going into the press regardless of the light curtain because the light curtain was not designed to be an "on/off switch." He also explained that it is unnecessary to reach into a press to pull out a part while the press is in automatic mode because clean-up occurs at the end of the shift. Plaintiff did not contradict Whiteside's testimony in his deposition. Although plaintiff testified that he was never told that he could not reach into the press and that "[t]he emphasis was put on a light curtain," plaintiff did not indicate that Whiteside instructed him that he could reach into the press without putting the press in manual mode or that he could partially climb into a press in order to obtain a part. Therefore, the evidence established that plaintiff was instructed not to reach into a press without putting it in manual mode and not to use the light curtain as an on/off switch.

It is clear that plaintiff used the press contrary to the warnings and instruction provided by Whiteside. Whiteside is a person who possessed knowledge or training regarding the use of the product through the 15 years he worked continuously with the presses and through his experience as a trainer. Whiteside instructed plaintiff not to reach into a press when it is in automatic mode and not to bypass the light curtain. I conclude that the evidence established that plaintiff misused the press by partially climbing into the press to retrieve parts while the press was in automatic mode. See MCL 600.2945(e).

The trial court also did not err in concluding that the misuse was not reasonably foreseeable. I agree with the majority that *some* manner of accidental or nonaccidental reaching into a press while the press is in automatic mode was reasonably foreseeable, which is why the light curtain was installed. However, I disagree with the majority's conclusion that plaintiff's act of partially climbing into the press while the press was in automatic mode was reasonably foreseeable.

First, there is no indication that this type of incident ever occurred before. The light curtain on Press Number 25 was installed in 1997. There is no evidence that any other injuries occurred from an operator partially climbing into a press during the over 13-year period that the

light curtain system was in place before plaintiff's accident. Several witnesses testified that they had not received a report of another incident occurring under similar circumstances. James Michalak, a maintenance general supervisor, was unaware of any press operator climbing into a press in order to retrieve parts. The majority alludes to the fact that a regular operator of Press Number 25 noticed that the press would clear even if something traversed the press opening. James Preston, a production supervisor who had used Press Number 25 in the past, testified in his deposition that the light curtain reset when he leaned into or reached into the press to obtain a runner. He admitted that his action of standing inside the light curtain was contrary to his training and that he "wasn't supposed to be doing that." Preston also explained that he did not inform his supervisor regarding the issue. Instead, the issue seemed to only happen with Preston because he was "so skinny," and he was the only one who encountered the issue with the press. Furthermore, Preston did not testify that he partially entered the press by lifting one leg onto the ledge of the press in the manner that plaintiff did, instead testifying that he reached into or leaned into the press. Consequently, there is no indication that anyone had ever suffered the type of injury that plaintiff suffered as a result of climbing partway into the press.

Second, there is no indication that climbing or partially climbing into a press from the front while the press is in automatic mode was common practice, and the fact that press operators relied on the light curtain to stop the press does not establish that plaintiff's conduct was reasonably foreseeable. The majority concludes that the evidence created a genuine issue of fact regarding whether the press operators could practically remove the finished products from the presses without reaching into the presses. There is no dispute that the operators were required to obtain parts from inside the press on occasion. However, the operators were required to put the press in manual mode beforehand in order to prevent the press from cycling while the operator was reaching inside it. The majority further concludes that press operators routinely relied on the light curtain when removing finished products from the presses. While it is true that there was evidence indicating that the press operators relied on the light curtain to stop a press in order for the operators to momentarily reach into the press and remove parts, there was no indication that the press operators routinely climbed or partially climbed into the press through the front opening in order to obtain parts while the press was in automatic mode.[1] In fact, there appears to be no legitimate reason why a press operator would partially climb into a press while it was cycling in automatic mode. Therefore, I conclude that plaintiff's conduct was not reasonably

[1] Plaintiff put his upper body and torso inside the press, and he placed his right knee onto the metal skirting on the front of the press. The press came down onto plaintiff's lower back and pushed his chest into his thigh. As a result, plaintiff's lower back and knee were injured. The location and extent of plaintiff's injuries highlight the fact that he went grossly beyond merely placing his hand into the press, which is reasonably foreseeable behavior, and instead partially climbed into the press, which is not reasonably foreseeable behavior.

foreseeable. See MCL 600.2947(2). Accordingly, I would affirm the trial court's order granting summary disposition in favor of defendant.

/s/ Kathleen Jansen

STATE OF MICHIGAN IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

ILIADES,STEVEN,T, Plaintiff,
V
DIEFFENBACHER NORTH AMERI(Defendant,

NO: 2012-129407-NP
HON. MARTHA D. ANDERSON

In the matter of:

ORDER REGARDING MOTION

Motion Title: Defendant Dieffenbacher North America, Inc.'s Motion for Summary Disposition, pursuant to MCR 2.116(C)(10).

The above named motion is:

- [x] granted.
- [ ] granted in part, denied in part.
- [ ] denied.
- [x] for the reasons stated on the record.

In addition: This Order resolves the last pending matter and closes the case.

DATED: 09/17/2014

HON. MARTHA D. ANDERSON
Circuit Court Judge

STATE OF MICHIGAN

6TH JUDICIAL CIRCUIT COURT FOR THE COUNTY OF OAKLAND

STEVEN T. ILIADES,

Plaintiff,

v File No. 2012-129407-NP

DIEFFENBACHER NORTH AMERICA, INC.,

Defendant.

_____/

MOTION FOR SUMMARY DISPOSITION

BEFORE THE HONORABLE MARTHA D. ANDERSON, CIRCUIT COURT JUDGE

Pontiac, Michigan - Wednesday, September 17, 2014

APPEARANCES:

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Pontiac, Michigan

Wednesday, September 17, 2014 - 10:01:20 a.m.

THE CLERK: Your Honor, calling number three on the call, Iliades versus Dieffenbacher North America, case number 12-129407-NP.

MR. HILBORN: Ready, your Honor. Craig Hilborn and David Kramer on behalf of plaintiff.

MR. BURKHOLDER: Good morning, Evan Burkholder on behalf of the defendant.

THE COURT: This is your motion, Mr. Burkholder?

MR. BURKHOLDER: Your Honor, there are a few items in the defendant's brief that I want to bring to the attention of the Court that the Court should not consider in light of the ruling on the admissibility of the testimony of a Flexible Products employee, Mr. James Michalak (ph), in ruling on a motion in limine the Court concluded that Mr. Michalak should not be permitted to offer opinion testimony. Accordingly, paragraphs 13 and 15 of our Statement of Facts submitted before the rulings on the motion in limine referred to Mr. Michalak's opinions. I don't believe the Court should consider those.

In addition, your Honor, I don't believe the Court should consider any of the opinions contained on the late filed affidavit of Ralph Barnett, plaintiff's expert.

The -- that affidavit was attached to plaintiff's response to our motion for summary judgment. The opinions set forth in that affidavit were never disclosed during discovery, were never the subject of question during a deposition, and were never identified in response to expert witness interrogatories.

Finally, your Honor, I believe the Court should take into consideration two additional exhibits that were filed following the deposition of Dr. Richter (sp), a deposition -- a trial deposition that was taken after the filing of the motions in limine. The reason I consider those -- those as significant are that in the first instance in our brief we refer to medical records where Mr. Iliades, on the day after the accident, in connection with the history taken by a physician we now know to be Dr. Richter, admitted that he had climbed into the machine, or climbed part way in the machine.

Not only did he make that admission to Dr. Richter, but in connection with Dr. Richter's deposition he moved some pages around and cleared up confusion and identified what have been submitted to the Court as Exhibits 4 and 5 to our brief. Those exhibits are two separate medical histories. On June 11th, literally the day after the accident, plaintiff told Dr. Richter in connection with the history that he had climbed into the

machine and had one leg and his entire torso in the machine. Six days later on June 17th Dr. Richter took another history. He just didn't copy and paste the first one, he took another history in a slightly different language, Mr. Iliades told him the same thing, that he had climbed into the machine and as a result was injured.

Here are the three critical facts, your Honor, and propositions that I think should result in this motion being granted. First of all, Dieffenbacher has established that Mr. Iliades climbed into the machine, or climbed part way into the machine bypassing this light curtain that prodect -- protected the large opening, significantly, Mr. Iliades has admitted to doing that.

More importantly, Mr. Barnett, plaintiff's own expert, as well as our expert, both agreed and have testified that Mr. Iliades climbed into the machine while it was running on automatic. It wasn't a question of reaching inside the machine, he climbed part way inside the machine.

Secondly, all of the testimony of plaintiff's fellow employees and the supervisors who trained Mr. Iliades conclusively -- conclusively establishes that Mr. -- Mr. Iliades was specifically told to never enter the machine, reach inside the machine, or otherwise get any part of his body in the machine when it was on automatic.

Plaintiffs made much of the point that, well, there are occasions when you can reach inside the machine. There's no doubt about that. That's like reaching inside the engine compartment of a car when the engine's turned off.

Plaintiffs are -- and employees are trained they can reach inside the machine, they can open doors and go in the -- (undecipherable) -- inside the machine when it's not running, when it's not on automatic. There is not one statement or one reference to a deposition in plaintiff's brief that -- that -- that stands for the proposition that Mr. Iliades was trained to climb inside the machine, or reach inside the machine, or put any part of his body inside the machine when it was running on automatic.

And we know from the earlier rulings of the Court that as a sophisticated employer, it's the employer's responsibility in this instance to train its employees. That's how they trained for Mr. Iliades, for him to climb inside the machine or put part of his body inside the machine when it was in automatic, not in any other setting, but when it was running, is a complete violation of the -- of the employer's training and the safety rules of Flexible Products.

And finally, your Honor, the undisputed testimony, both from the Flexible Products supervisor, Jim

Michalak, and this is admissible, and from Dieffenbacher, is that neither Flexible Products nor Dieffenbacher has ever received a report of an injury occasioned by an employee climbing part way inside a machine -- one of these moulding machines, when it was running in automatic. That testimony has not been disputed.

When you put those three facts together, your Honor, we believe that we have established the textbook definition of the misuse of a product under circumstances that was entirely unforeseeable. Thank you.

THE COURT: Thank you.

MR. HILBORN: Your Honor, the defendant makes much about whether it's in automatic or not in automatic. What this is, what the light screen is, is a guard to prevent the machine from moving once you break the light screen. There's a big opening, had you tripped in there, had you fallen in there, it's supposed to stop the machine from moving.

The defendant originally had a door that came down that prevented anyone from getting through that particular door. And they removed that door. They replaced it with a light screen on this particular machine that did not have an automatic reset button. This is the defect. When you break the light screen you've got to get out of the area of danger, hit a button, and get the

machine rolling again.

He makes much about whether or not the machine was in automatic or manual. This -- the machine was in the middle of a cycle so the machine could run on automatic where it stamps the parts, you stick your hands in there, it stops, you pull the parts out. Once you clear the light screen it continues to run and you don't have to hit a button. On manual, had -- had Mr. Iliades done the exact same thing, had he broke the light screen, the machine stopped, it's not moving. That's a misconception that he keeps trying to get people to believe that the machine's moving. It's stopped. It is -- it's not moving anywhere.

So he asked employees, would you ever go inside the machine while the machine's running? And they say no. Of course they would say no. My client would say no. The machine had stopped. He thought it was safe to get the parts out. He's given a parts grabber -- you've seen the machine, he's given a parts grabber, he's leaning in. The way they designed the light screen without having a manual reset button that he'd have to go back, he got beyond the light screen and the machine began to cycle.

Now, this defendant clearly knew that they should have manual reset buttons. Their other machines in the plant were wired with manual reset buttons when you

break the light screen. So, he can't tell you how many of those machines have automatic -- in other words, once you got out of the light screen the machine started up again, or manual, once you broke the light screen you had to go in and touch -- touch the button to get the machine running again.

What they've really done is taken a safe design with the door where, whether you fell in there or no matter what, the machine wouldn't continue to run, it stopped, it knew you were in an area of danger and replaced it with a dangerous, in violation of ANSI standard, automatic reset button.

And now he says they ran this -- these -- these machines in the plant without any other injuries. Number one, they say they have no documents so we don't know whether or not anybody's been injured on these machines or not. They've -- they've represented they have none of their former documents, so, you know, the fact that we don't have documents is proof that no other accidents happened.

We know an accident happened with one of their machines in New Orleans, but they don't have any facts about that particular machine because they can't tell us about it because they don't have any documents.

I want to talk to you -- you know, he says

all these machines have been run. Every job's different. Not all the parts that are run in these machines fall down into the bottom where you need a parts grabber to grab it out. We don't know how many of those jobs were run on machines where, if you broke the light screen and you went and you leaned in too far you had to go and set a manual reset button, and how many were run like this machine with the automatic reset button.

I will tell you that the defendant doesn't cite a single published case to stand for the proposition that what Mr. Iliades was doing was misuse. Number one, I don't believe it is misuse. The whole point of a light screen is to guard against you going past that light screen and having the machine move. So, there's no misuse.

And if -- and even if you were to say that this was misuse, the whole reason that opening's guarded, Judge, is because they know once you get past it, it's dangerous. That's why the guard's there in the first place. And so to -- to argue that this is some sort of unforeseeable misuse is simply not true.

Finally, I'll address my expert witness affidavit that's attached to -- to our response. He outlined five areas in which he was going to provide testimony in. It's safety design, control design, power press safety, control velocity, clean machinery, warning

theory. He had the opportunity to ask him about misuse during his deposition, our expert. The fact that he didn't ask whether or not this machine was being misused or this was some sort of example of misuse, and now he wants to complain because we've responded to his motion for summary disposition on that particular issue addressing those five issues, is really improper.

I've had lots of motions for summary disposition filed against me, typically if they're raising an issue that they didn't raise in a deposition or any other way, that's how you respond to it, you have your expert fill out an affidavit and respond to those particular points.

So, number one, this was not misuse of the machine, he was given a -- a tool to pick these parts out, and that's what he was doing, he was doing his job. If you look at the cases that he cited, both un-cited -- or both unpublished cases, it has to do with using the machine in a manner -- or, not using the machine, one is, they're trying to repair a hi-lo and he's trying to repair it with a screwdriver, he has no experience repairing it, he has no ability to know how to repair it, and he touches two connections and makes it move and it causes an injury to him.

The other one is where the installer of a

furnace does a contrary to the instructions.

But I will tell you that the testimony that the defendant keeps saying that the -- he was trained not to do this, of course he was trained not to go into the machine while it was running. The machine was stopped. It was not moving. So, for those reasons his motion for summary dis -- disposition should be denied.

THE COURT: Mr. Hilborn, didn't your -- didn't the plaintiff testify that he knew the purpose of the -- of the light --

MR. BURKHOLDER: Curtain.

THE COURT: -- curtain and that he knew that it would automatically restart?

MR. HILBORN: Yeah, but he -- but he also -- he didn't know that by -- he shouldn't have been able to get by it. I mean, it should have been designed that it stopped at that point in time. It should have -- and that's the point, he may have known that but clearly he didn't know that the machine was going to restart. It's the way that the thing is -- is installed. It should have prevented him from being able to get past that. That's also another allegation. He should not have been able to get past the light screen, it should have stopped.

THE COURT: But he -- wasn't he aware of the fact that if you do it improperly that the machine would

start up automatically?

MR. HILBORN: I -- I do not believe he thought he was doing anything improperly. I think he thought what he was doing by reaching in there enough of his body was still engaged with the light screen that it would not start up.

THE COURT: Well, he had quite a bit of his body in there didn't he?

MR. HILBORN: Correct. Correct. He did, but, you know, if you look at the light screen manual, which we've attached to our motion for summary disposition, which clearly identifies how the light screen's supposed to sit -- be set up, there's no way that it should ever be able to continue to cycle at that point in time.

THE COURT: Thank you. Do you wish to reply?

MR. BURKHOLDER: No, I'll stand on what I've said to date.

THE COURT: This matter is before the Court on defendant, Dieffenbacher North America, Incorporated, motion for summary disposition pursuant to MCR 2.116(C)(10). The instant action arises out of a workplace injury which occurred on June 10th, 2011 during plaintiff, Steven Iliades's employment as a machine operator for Flexible Products Company in Auburn Hills, Michigan.

Plaintiff alleges that on the day in question

he was working on a moulding press known as Press number 25, attempting to clean out rubber parts which had fallen behind and down into the press. Plaintiff alleges that while leaning into the press the machine unexpectedly and without warning began to cycle, resulting in the 500 ton press crushing down on his back. As a result of the injuries sustained in this accident on September 17th, 2012, plaintiff, Steven Iliades, and his wife, Jane Iliades, filed a four count complaint against defendants Dieffenbacher North America, Incorporated, Sherdil Precision, Incorporated, excuse me, and Leuze Electronic, Incorporated.

Plaintiff, Steven, alleges negligence, gross negligence and breach of warranty against defendants and plaintiff, Jane, alleges a derivative claim for loss of consortium against defendants.

On August 7th, 2013 and October 16th, 2013 the Court dismissed plaintiffs claims against defendant, Leuze Electronic, and defendant, Sherdil Precision, respectively. Thus, only plaintiffs claims against defendant, Dieffenbacher, remain pending before this Court.

The defendant, Dieffenbacher, now brings this motion subject -- brings the subject motion for summary disposition pursuant to MCR 2.116(C)(10). Defendant, Dieffenbacher's, motion is premised upon the argument that

plaintiff, Steven's, complete failure to follow his employer's training rules and safety regulations, coupled with his deliberate actions, amount to unforeseeable misuse of the subject machine within the meaning of MCL 600.2947(2), compelling summary disposition as to all of plaintiff's claims under MCR 2.116(C)(10).

Plaintiffs opposed defendant, Dieffenbacher's, motion arguing that a genuine issue of material fact exists as to whether plaintiff, Steven, was engaged in unforeseeable misuse of the subject press machine at the time of the incident. The applicable statute, MCL 600.2947, provides: a manufacturer or seller is not liable in a product liability action for harm caused by the misuse of a product unless the misuse was reasonably foreseeable. Whether there was misuse of a product and whether misuse was reasonably foreseeable are legal issues to be resolved by the Court. MCL 600.2947(2).

As utilized in this statute, misuse is defined as, use of a product in a materially different manner than the product's intended use. Misuse includes uses consist -- inconsistent with the specifications and standards applicable to the product, uses contrary to a warning or instruction provided by the manufacturer, seller or another person possessing knowledge or training regarding the use or maintenance of the product, and uses

other than those for which the product would be considered suitable by a reasonably prudent person in the same or similar circumstances. MCL 600.2945(e).

The Court, having reviewed the parties' respective motions, response, reply briefs in support and supporting documentation, considering the evidence -- excuse me, the arguments presented by counsel, as well as viewing the evidence in the light most favorable to plaintiffs, finds that plaintiff, Steven, misused the moulding press machine in question, and furthermore, that plaintiff, Steven's, misuse of the subject moulding press machine at the time of the subject incident, was not reasonably foreseeable by defendant, Dieffenbacher.

The undisputed testimony in this case reveals that plaintiff, Steven's, employer trained plaintiff not to reach into the operating area of defendant's press while in automatic mode. Plaintiff, Steven, had full knowledge that three separate emergency stop devices existed on the subject press to remove the machine from automatic mode, that the light curtain is not to be used as an emergency stop switch because there is no guarantee that the press will stop, and that a switch existed on the subject press to place the machine into manual mode to allow him to reach into the machine.

Moreover, plaintiff, Steven, had full

knowledge of that -- of the fact that if he tripped the light curtain and then cleared it, the subject press machine would automatically begin its operation again, which is specifically what happened in this case.

Finally, plaintiffs failed to present this Court with any evidence to show that defendant, Dieffenbacher, could have foreseen that a press operator would not only reach inside a running press, but actually try to climb even partially into the press as testified to by plaintiff's expert to retrieve a part.

To the contrary, all the evidence shows that plaintiff, Steven, completely ignored his employer's policies, procedures and directives, including on-the-job training relative to the proper operation of the subject machine. He not only reached into the operating area of a running press machine, but climbed at least partially into it. It is this Court's opinion that this behavior constitutes unforeseeable misuse pursuant to MCL 600.2945(e).

Consequently, the Court grants defendant, Dieffenbacher's, motion for summary disposition pursuant to MCR 2.116(C)(10) and dismisses the plaintiff's complaint in its entirety against it and the Court will enter its order. Thank you.

(At 10:23:10 a.m., hearing concluded)

CERTIFICATION

This is to certify that the attached electronically recorded proceeding, consisting of eighteen (18) pages, before the 6th Judicial Circuit Court, Oakland County in the matter of:

STEVEN T. ILIADES

v

DIEFFENBACHER NORTH AMERICA, INC.

_____/

Location: Circuit Court

Date: Wednesday, September 17, 2014

was held as herein appeared and that this is testimony from the original transcript of the electronic recording thereof, to the best of my ability.

I further state that I assume no responsibility for any events that occurred during the above proceedings or any inaudible responses by any party or parties that are not discernible on the electronic recording of the proceedings.

/s/ Sally Fritz
Sally Fritz, CER #7594
Certified Electronic Recorder

Dated: September 18, 2014

Back Print

Case Number	2012-129407-NP
Entitlement	ILIADES STEVEN T vs. DIEFFENBACHER NORTH AMERICA IN
Judge Name	MARTHA D. ANDERSON
Case Filed	09/17/2012
Case Disposed	09/17/2014
Case E-Filed	YES

Date	Code	Description
10/09/2014	ORD	ORDER FILED DENY PLF MTN RECON
10/07/2014	MTN	MOTION FILED RECON/MEM/POS
09/23/2014	TRN	TRANSCRIPT FILED MTN SUM DISP 9/17/14
09/17/2014	DM	DEFENSE MOTION SUM DISP GRTD
09/17/2014	FDS	FINAL DISP-SUMMARY DISP
09/17/2014	ORD	ORDER FILED GRANT DFT MSD
09/15/2014	POS	AFFIDAVIT/PROOF OF SERVICE FILED
09/02/2014	ORD	ORDER FILED DISMISS CASE EVAL S/CAUSE
08/27/2014	OTH	SUBPOENA FILED
08/27/2014	OTH	SUBPOENA FILED
08/27/2014	OTH	SUBPOENA FILED
08/18/2014	POS	AFFIDAVIT/PROOF OF SERVICE FILED
08/18/2014	POS	AFFIDAVIT/PROOF OF SERVICE FILED
08/18/2014	POS	AFFIDAVIT/PROOF OF SERVICE FILED
07/30/2014	SO	SCHEDULING ORDER FILED AMD
07/29/2014	FMA	ALLOW FILING OF MOTIONS
07/29/2014	APC	ADJ-COUNSEL 07312014 TO 09042014 BY ORDER
07/29/2014	APR	DATE SET FOR PRETRIAL ON 09042014 08 30 AM Y
07/29/2014	FMA	ALLOW FILING OF MOTIONS

Date	Code	Description
07/29/2014	APC	ADJ-COUNSEL 08052014 TO 09182014 BY ORDER
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07/29/2014	NOH	NOTICE OF HEARING FILED /POS
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07/29/2014	NTC	NOTICE FILED TAKE DEP/POS
07/28/2014	OMA	CASE EVALUATION OUTCOME 06172014 REJECTED
07/25/2014	POS	AFFIDAVIT/PROOF OF SERVICE FILED
07/25/2014	POS	AFFIDAVIT/PROOF OF SERVICE FILED
07/25/2014	POS	AFFIDAVIT/PROOF OF SERVICE FILED
07/25/2014	POS	AFFIDAVIT/PROOF OF SERVICE FILED
07/24/2014	ORD	ORDER FILED RE MOTIONS IN LIMINE
07/23/2014	NTC	NOTICE FILED VIDEO DEP/POS
07/23/2014	POS	AFFIDAVIT/PROOF OF SERVICE FILED
07/23/2014	POS	AFFIDAVIT/PROOF OF SERVICE FILED
07/22/2014	NTC	NOTICE FILED VIDEO DEP/POS
07/22/2014	NTC	NOTICE FILED OF FILING EXHIBITS/POS
07/18/2014	NTC	NOTICE FILED VIDEO DEPO OF WEINSTEIN/POS
07/18/2014	TRN	TRANSCRIPT FILED MOTIONS IN LIMINE 6/25/14
07/18/2014	MEM	MEMORANDUM FILED W/DRAW OBJ TO DFT PROP ORD/POS/PLF

Date	Code	Description
07/17/2014	OTH	SUBPOENA FILED
07/17/2014	OTH	SUBPOENA FILED
07/17/2014	OTH	SUBPOENA FILED
07/17/2014	OTH	SUBPOENA FILED
07/17/2014	OTH	SUBPOENA FILED
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07/09/2014	POS	AFFIDAVIT/PROOF OF SERVICE FILED /SUBPOENA
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07/08/2014	POS	AFFIDAVIT/PROOF OF SERVICE FILED
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06/30/2014	NTC	NOTICE FILED VIDEO DEPO HATCHER RE ILIADES/POS
06/26/2014	ORD	ORDER FILED APPEAR
06/25/2014	M	MOTION IN LIMINE TO PRECLUDE NEGATIVE
06/25/2014		EVIDENCE DENIED
06/25/2014	M	MOTION IN LIMINE TO PRECLUDE WORKER'S COMP
06/25/2014		COMPENSABILITY INVESTIGATION HEARD
06/25/2014	M	MOTION IN LIMINE TO PRECLUDE UNDISCLOSED OPINIONS
06/25/2014		GRTD
06/25/2014	M	MOTION IN LIMINE TO PRECLUDE UNFOUNDED EXPERT TESTIMONY
06/25/2014		OF JAMES MICHALAK GRTD
06/25/2014	M	MOTION IN LIMINE TO PRECLUDE REFERENCE TO DRUG USE

Date	Code	Description
06/25/2014		HEARD
06/25/2014	DM	DEFENSE MOTION IN LIMINE TO BAR EVIDENCE OF
06/25/2014		MIOSHA REGULATIONS, VIOLATIONS AND ABATEMENT
06/25/2014		OF VIOLATIONS GRTD
06/25/2014	DM	DEFENSE MOTION IN LIMINE TO BAR PLTF'S EXPERT FROM
06/25/2014		REFERENCING IRRELEVANT STANDARDS HEARD
06/25/2014	DM	DEFENSE MOTION IN LIMINE TO BAR PLTFS EXPERT FROM
06/25/2014		IMPROPERLY REFERENCING INADMISSIBLE MATERIALS
06/25/2014		TO BOLSTER HIS TESTIMONY HEARD
06/25/2014	DM	DEFENSE MOTION IN LIMINE TO BAR TESTIMONY RE
06/25/2014		WARNINGS HEARD; COURT TO ISSUE DECISION
06/25/2014		AFTER FURTHER REVIEW OF ISSUE
06/18/2014	RES	RESPONSE FILED DFT MTN LIM PRECL TEST MICHALAK/BRF/POS
06/18/2014	ANS	ANSWER FILED TO MTN IN LIM RE DRUG USE/BRF/POS/DFT
06/18/2014	RES	RESPONSE FILED DFT TO MTN LIM PRECL NEG EVID/POS
06/18/2014	RES	RESPONSE FILED DFT TO MTN LIM PRECL OPN/POS
06/18/2014	RES	RESPONSE FILED DFT/TO PLF MTN LIMINE/POS
06/18/2014	RES	RESPONSE FILED PLF/TO DFT MTN LIMINE/BRF/POS
06/18/2014	RES	RESPONSE FILED IN OPPT TO MTN IN LIM/BRF/POS/PLF
06/18/2014	RES	RESPONSE FILED OPP DFT MTN BAR PLF EXPERT/BRF/POS/PLF
06/09/2014	POS	AFFIDAVIT/PROOF OF SERVICE FILED
06/04/2014	NTC	NOTICE FILED 3RD AMD JOHN BURKE DEPO/POS
05/30/2014	MPR	MOTION PRAECIPE FILED FOR 07302014 JUDGE 04
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05/29/2014	APC	ADJ-COUNSEL 07082014 TO 07312014 BY NOTICE
05/29/2014	APR	DATE SET FOR PRETRIAL ON 07312014 08 30 AM Y
05/29/2014	ORD	ORDER FILED RE DFT MTN FOR SD
05/29/2014	NOH	NOTICE OF HEARING FILED /POS

Date	Code	Description
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05/14/2014	DM	DEFENSE MOTION TO DISALLOW UNTIMELY MOTION IN
05/14/2014		LIMINE IN VIOLATION OF COURT ORDER HEARD
05/05/2014	MPR	MOTION PRAECIPE FILED FOR 05142014 JUDGE 04
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05/02/2014	RES	RESPONSE FILED PLF TO DFT AMD OBJ UNTIMELY MTN/BRF/POS
04/28/2014	ADJ	ORDER OF ADJOURNMENT FILED CASE EVAL/STP
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04/28/2014	APR	DATE SET FOR CASE EVAL ON 06172014 8 20 AM
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04/24/2014	MPR	MOTION PRAECIPE FILED FOR 05072014 JUDGE 04
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04/15/2014	MPR	MOTION PRAECIPE FILED FOR 06252014 JUDGE 04
04/15/2014	MPR	MOTION PRAECIPE FILED FOR 06252014 JUDGE 04

Date	Code	Description
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04/04/2014	MTN	MOTION FILED FOR SUM DISP/POS/NOH/BRF/DFT
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04/03/2014	APR	DATE SET FOR CASE EVAL ON 04222014 2 30 PM
04/03/2014	APM	ADJOURNED PER CASE EVALUATION CLERK FROM 04222014
04/03/2014	APR	DATE SET FOR CASE EVAL ON 04222014 9 00 AM
04/03/2014	ADJ	ORDER OF ADJOURNMENT FILED STP CASE EVAL
03/31/2014	ADJ	ORDER OF ADJOURNMENT FILED /STP CASE EVAL
03/17/2014	NTC	NOTICE FILED DEP/POS
02/26/2014	POS	AFFIDAVIT/PROOF OF SERVICE FILED
02/14/2014	ANS	ANSWER FILED 2ND INT/REQ TO PROD/POS/DFT

Date	Code	Description
02/07/2014	APR	DATE SET FOR CASE EVAL ON 04152014 1:00 PM
02/03/2014	APM	ADJOURNED PER CASE EVALUATION CLERK FROM 02112014
02/03/2014	APR	DATE SET FOR CASE EVAL ON 04152014 NO TIME SET
02/03/2014	ORD	ORDER FILED EXTEND SCHED ORD DATES
01/30/2014	AID	ADJOURN FOR INVESTIGATION/DISCOVERY
01/30/2014	APC	ADJ-COUNSEL 05202014 TO 07082014 BY ORDER
01/30/2014	APR	DATE SET FOR PRETRIAL ON 07082014 08 30 AM
01/30/2014	AID	ADJOURN FOR INVESTIGATION/DISCOVERY
01/30/2014	APC	ADJ-COUNSEL 06102014 TO 08052014 BY ORDER
01/30/2014	APR	DATE SET FOR TRIAL ON 08052014 08 30 AM
01/29/2014	M	MOTION TO EXT DISC & FOR SANCTIONS AGAINST DEF -G-
01/24/2014	RES	RESPONSE FILED DFT/TO PLF MTN TO EXTEND DISC/SANC/POS
01/13/2014	MTN	MOTION FILED PLF/TO EXTEND DISC/SANC/BRF/NOH/POS
01/13/2014	MPR	MOTION PRAECIPE FILED FOR 01292014 JUDGE 04
12/16/2013	WLT	WITNESS LIST FILED AMD/PRELIM EXH/POS/DFT
12/16/2013	WLT	WITNESS LIST FILED PLF/AMD/EXH/POS
12/06/2013	APR	DATE SET FOR CASE EVAL ON 02112014 1:00 PM
10/31/2013	POS	AFFIDAVIT/PROOF OF SERVICE FILED
10/30/2013	AID	ADJOURN FOR INVESTIGATION/DISCOVERY
10/30/2013	APC	ADJ-COUNSEL 03062014 TO 05202014 BY ORDER
10/30/2013	APR	DATE SET FOR PRETRIAL ON 05202014 08 30 AM
10/30/2013	AID	ADJOURN FOR INVESTIGATION/DISCOVERY
10/30/2013	APC	ADJ-COUNSEL 04082014 TO 06102014 BY ORDER
10/30/2013	APR	DATE SET FOR TRIAL ON 06102014 08 30 AM
10/30/2013	SO	SCHEDULING ORDER FILED AMD
10/30/2013	APM	ADJOURNED PER CASE EVALUATION CLERK FROM 12172013
10/30/2013	APR	DATE SET FOR CASE EVAL ON 02112014 NO TIME SET
10/22/2013	MPR	MOTION PRAECIPE FILED FOR 10302013 JUDGE 04
10/22/2013	MTN	MOTION FILED PLF/UNOPPOSED FOR 2ND AMD/BRF/NOH/POS

Date	Code	Description
10/17/2013	STO	STIP/ORD FILED RE AMD AFM
10/17/2013	ORD	ORDER FILED GRNT MT NSUM DISP
10/17/2013	AFM	AFFIRMATIVE DEFENSES FILED AMD/POS/DFT
10/16/2013	WLT	WITNESS LIST FILED PLF/EXH/POS
10/16/2013	WLT	WITNESS LIST FILED DIEFFENBACHER/PRELIM/EXH/POS
10/16/2013	DM	DEFENSE MOTION (SHERDIL PRECISION) FOR SD UNOPPOSED -G-
10/16/2013		DOES NOT FD THE CASE
10/15/2013	WLT	WITNESS LIST FILED DIEFFENBACHER/EXPERT/PRELIM EXH/POS
10/04/2013	APR	DATE SET FOR CASE EVAL ON 12172013 1:00 PM
09/04/2013	ORD	ORDER FILED RE DFT MTN SUM DISP
08/29/2013	MTN	MOTION FILED SHERDIL PRECISION/SUM DISP/BRF/NOH/POS
08/29/2013	MPR	MOTION PRAECIPE FILED FOR 10162013 JUDGE 04
08/29/2013	MPR	MOTION PRAECIPE FILED FOR 10162013 JUDGE 04
08/08/2013	STO	STIP/ORD FILED EXT SCHED ORD DATES
08/08/2013	APM	ADJOURNED PER CASE EVALUATION CLERK FROM 10152013
08/08/2013	APR	DATE SET FOR CASE EVAL ON 12172013 NO TIME SET
08/08/2013	ORD	ORDER FILED GRT LUEZE MSD
08/07/2013	DM	DEFENSE MOTION SUM DISP GRTD
08/02/2013	AID	ADJOURN FOR INVESTIGATION/DISCOVERY
08/02/2013	APC	ADJ-COUNSEL 11142013 TO 03062014 BY ORDER
08/02/2013	APR	DATE SET FOR PRETRIAL ON 03062014 08 30 AM
08/02/2013	AID	ADJOURN FOR INVESTIGATION/DISCOVERY
08/02/2013	APC	ADJ-COUNSEL 02042014 TO 04082014 BY ORDER
08/02/2013	APR	DATE SET FOR TRIAL ON 04082014 08 30 AM
08/02/2013	BRF	BRIEF FILED /REP IN SUPPT OF DFT MTN FOR SD/POS/DFT
08/02/2013	APR	DATE SET FOR CASE EVAL ON 10152013 1:00 PM
07/29/2013	RES	RESPONSE FILED TO MTN FOR SUM DISP/POS/PLF
07/17/2013	RES	RESPONSE FILED TO MTN FOR SD/BRF/POS/PLF

Date	Code	Description
06/03/2013	POS	AFFIDAVIT/PROOF OF SERVICE FILED
05/22/2013	MTN	MOTION FILED FOR SUM DISP/NOH/BRF/POS/DFT
05/22/2013	MPR	MOTION PRAECIPE FILED FOR 08072013 JUDGE 04
05/22/2013	ORD	ORDER FILED RE MTN SUM DISP
05/08/2013	MPR	MOTION PRAECIPE FILED FOR 05152013 JUDGE 04
05/08/2013	MTN	MOTION FILED PLF/TO COMPEL/BRF/NOH/POS
04/02/2013	POS	AFFIDAVIT/PROOF OF SERVICE FILED
04/02/2013	POS	AFFIDAVIT/PROOF OF SERVICE FILED
02/13/2013	POS	AFFIDAVIT/PROOF OF SERVICE FILED
02/05/2013	NTC	NOTICE FILED NON PTY FAULT/POS
01/17/2013	ORD	ORDER FILED PROTECTIVE/AUTHORIZATION
01/16/2013	DM	DEFENSE MOTION (SHERDIL PRECISION) FOR HIPAA ORDER GRTD
01/15/2013	REP	REPLY FILED DFTS TO RES MTN QUAL PROTECT ORD
01/11/2013	RES	RESPONSE FILED OPP DFT MTN PROT ORD/BRF/PLF
01/11/2013	POS	AFFIDAVIT/PROOF OF SERVICE FILED
01/09/2013	OTH	CONCUR/JOINDER W/DFT MTN QUAL PROT ORD FILED/POS
01/03/2013	MTN	MOTION FILED FOR QUALIFIED PROTECTIVE ORD/BRF/POS/DFT
01/03/2013	MPR	MOTION PRAECIPE FILED FOR 01162013 JUDGE 04
01/03/2013	NOH	NOTICE OF HEARING FILED
12/14/2012	STO	STIP/ORD FILED TO PRODUCE DOCS
11/30/2012	ORD	ORDER FILED PRETRIAL
11/26/2012	SO	SCHEDULING ORDER FILED
11/24/2012	SOP	SCHEDULING ORDER WRITTEN
11/24/2012		08/16/2013 EXPERT DATE.
11/24/2012		10/15/2013 CASE EVALUATION DATE.
11/24/2012		08/16/2013 WITNESS DATE.
11/24/2012		10/15/2013 MOTION DATE.
11/24/2012		09/13/2013 DISCOVERY DATE.

Date	Code	Description
11/24/2012		11/14/2013 SETTLEMENT CONFERENCE.
11/24/2012		02/04/2014 TRIAL DATE.
11/24/2012	APR	DATE SET FOR PRETRIAL ON 11142013 09 00 AM
11/24/2012	APR	DATE SET FOR TRIAL ON 02042014 09 00 AM
11/08/2012	ATC	ANSWER TO COMPLAINT FILED AFM/JD/POS/DFT
11/05/2012	SUM	P/S ON SUMMONS FILED 09/26/12
11/05/2012	SUM	P/S ON SUMMONS FILED 09/18/12
11/02/2012	ATC	ANSWER TO COMPLAINT FILED /AFM/JD/POS/SHERDIL
10/25/2012	APP	APPEARANCE FILED /POS/DIEFFENBACHER
10/25/2012	ATC	ANSWER TO COMPLAINT FILED /AFM/JD/POS/DIEFFENBACHER
10/18/2012	APP	APPEARANCE FILED /NTC/POS/DFT
09/21/2012	SUM	P/S ON SUMMONS FILED 09/20/12
09/17/2012	C	COMPLAINT FILED /JD
09/17/2012	SI	SUMMONS ISSUED
09/17/2012	SI	SUMMONS ISSUED
09/17/2012	SI	SUMMONS ISSUED

STATEMENT OF THE BASIS OF APPELLATE JURISDICTION

The Supreme Court has jurisdiction pursuant to *MCR 7.303(B)(1)* over the Application for Leave, filed pursuant to *MCR 7.305(B)(1)-(3)*, by the Defendant Dieffenbacher North America, Inc., from the Opinion of the Michigan Court of Appeals entered on July 19, 2016 reversing the Order of the Oakland County Circuit Court entered on September 17, 2014 granting summary disposition to Defendant.

STATEMENT OF QUESTION PRESENTED

WHETHER, AS A MATTER OF LAW, THE DEFENDANT DIEFFENBACHER IS ENTITLED TO SUMMARY DISPOSITION PURSUANT TO *MCR 2.116(C)(10)* ON THE BASIS THAT PLAINTIFF STEVEN ILIADES ENGAGED IN UNREASONABLE AND UNFORESEEABLE PRODUCT MISUSE, AS DEFINED IN THE ABSOLUTE LEGAL DEFENSE PROVIDED TO MANUFACTURERS UNDER *MCL §600.2947(2)* AND *MCL §600.2945(e)*, BY CLIMBING PARTIALLY INTO A RUBBER MOLDING PRESS WITHOUT SWITCHING THE MACHINE FROM AUTOMATIC TO MANUAL MODE WHERE, AS A MATTER OF UNDISPUTED FACT, ILIADES' INTENTIONAL CONDUCT IS UNPRECEDENTED AND IN COMPLETE DISREGARD OF THE INSTRUCTIONS AND TRAINING PROVIDED BY ILIADES' EMPLOYER?

Plaintiff-Appellee says "No".

Defendant-Appellant says "Yes".

The Circuit Court said "Yes".

A Court of Appeals majority said "No".

The Court of Appeals dissent said "Yes".

STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

The sole issue presented in this Application for leave is whether, as a matter of law, the Defendant Dieffenbacher is entitled to summary disposition pursuant to *MCR 2.116(C)(10)* because, as a matter of undisputed fact, Plaintiff Steven Iliades engaged in unreasonable and unforeseeable product misuse, as defined in the absolute legal defense provided to manufacturers under *MCL §600.2947(2)*[3] and *MCL §600.2945(e)*[4], by climbing partially into a Dieffenbacher 500 ton rubber molding press while the machine was running in automatic mode, an action which was indisputably unprecedented, contrary to common practice, and in complete disregard of the instructions and training provided by Iliades' employer. Resolution of this issue requires a comprehensive review of the background facts and the proceedings before the lower courts.

Background Facts

On June 10, 2011, Steven Iliades was operating a Dieffenbacher 500 ton vertical injection rubber molding machine, specifically, Press No. 25, at his place of employment, Flexible Products Co. ("Flexible Products") (Iliades Dep **Ex 1**, p 95). At the time, Iliades was an experienced molding machine operator, with over a year of experience working at Flexible Products on 10 different presses (**Ex 1**, pp 95-97). According to his employer, before June 10, 2011, Iliades would have operated Dieffenbacher molding machines for more than 10,500 cycles before his accident (Michalak Dep, **Ex 6,** p 51).

[3] "(2) A manufacturer or seller is not liable in a product liability action for harm caused by misuse of a product unless the misuse was reasonably foreseeable. Whether there was misuse of a product and whether misuse was reasonably foreseeable are legal issues to be resolved by the court."

[4] "(e) 'Misuse' means use of a product in a materially different manner than the product's intended use. Misuse includes uses inconsistent with the specifications and standards applicable to the product, uses contrary to a warning or instruction provided by the manufacturer, seller, or another person possessing knowledge or training regarding the use or maintenance of the product, and uses other than those for which the product would be considered suitable by a reasonably prudent person in the same or similar circumstances."

The typical production cycle for the molding machines as used by Flexible Products lasts between seven and nine minutes (**Ex 6,** p 111). At the conclusion of each cycle, the machines stop, allowing operators to safely reach in and remove completed parts (**Ex 6,** p 45). The machines will not start up until the operator has removed the finished part and pushes the start button (Preston Dep, **Ex 23**, pp 24-25).

In 2011, Flexible Products owned over 50 Dieffenbacher molding machines, including Press No. 25, which featured light curtains, safety devices intended to protect operators from injuries associated with improper user contact with the operating area of the press (Dzierzawski Dep, **Ex 2**, p 61; **Ex 6**, at 51). The light curtains are designed to interrupt press operations before the end of a cycle in the event that an operator's hand/arm inadvertently breaks the beam of light directed at the front opening (Whiteside Dep, **Ex 3**, pp 14-15).

*Press No. 25 (**Ex 4,** photo admitted as exhibit to Michalak Dep, **Ex 6**)*

Previously, the Dieffenbacher presses were guarded by a physical barrier that moved down in front of the opening to the press during automatic cycles (Brumaru Aff, **Ex 5,** ¶ 2). Flexible Products complained that the physical barriers caused problems with related valves, safety guard adjustments and the proper operation of this physical device (**Ex 5,** ¶ 2). Therefore, in 1995, and at the request of Flexible Products, Dieffenbacher designed a replacement safety device in the form of the light curtain (**Ex 5,** ¶ 3; Brumaru Dep Ex, **Ex 24**).

Light curtains were installed on the Dieffenbacher machines at Flexible Products after tests confirmed the curtains could not be bypassed during automatic running by operators standing in any number of different locations outside the front of the molding machine (**Ex 5, ¶¶** 2-3). By 2001, all the Dieffenbacher molding machines at Flexible Products had virtually identical light curtains in place (**Ex 6,** p 51; Brumaru Dep, **Ex 7**, p 44).

All of the Dieffenbacher molding machines are designed to normally operate in automatic mode (Mejia Dep, **Ex 9**, pp 12-13). All Flexible Products press operators are specifically trained to never reach inside the operating area when a press is running in automatic because such unsafe actions could result in serious injury (**Ex 9**, pp 12-13[5]). Specifically with respect to instances where finished products pop off or fall from the press platens, operators are instructed and trained to manually stop the press and then retrieve the wayward parts via a rear access door (**Ex 6**, pp 48, 113-115[6]). Three manual emergency stop buttons are located on the main and the remote control panels of presses (**Ex 9**, p 23).

Photos of Flexible Products Press No. 25 separately depict rear access and front access with insertion of a parts grabber (**Ex 4**. See also: Ver Halen Dep **Ex 8**, p 56).

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Q When everything is working as it should, am I correct the presses run in what's called – they run in automatic?
A Yes, sir.
Q Am I correct that the . . . . Are new operators trained by you never to reach inside the operating area of a press when it's running in automatic?
A Yes, Sir, just because of safety and also if you . . . . There's a lot of reasons we don't do it but safety is number one.

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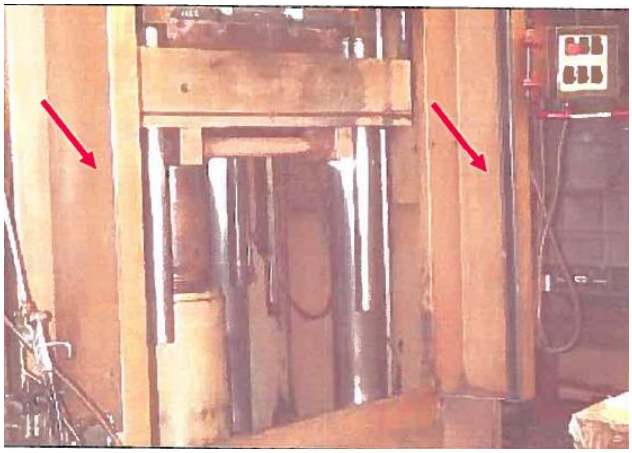
Q What are the operators trained to do before they can reach inside one of these presses and remove parts.
A They're trained to go open the [rear] door and retrieve parts. That is the way they're trained.
Q And are they trained to only retrieve parts when the spindle is in position blocking the platens?
A Yes, and in manual, when the press is in manual.
. . .
Q As soon as you change the setting from automatic to manual, will the press stop?
A The press stops.

***

Q So if we could summarize, it sounds like you're saying that – because of your familiarity with the training procedures used by Flexible Products, am I correct that operators are trained that they should never reach inside the machine whether through the safety doors or through the front opening, at any time when the machine is in automatic?
A No, they should not.

Rear Access and Use of Parts Grabber Avoids Climbing Inside (Exhibit 4)

The next photos depict a different view of the front portion of Press No. 25 (**Ex 10**).



The red arrows indicate the light curtain housing (the black vertical strips) located on either side of the front opening. When an object crosses the light beam, the operation of the press is interrupted (Iliades Dep, **Ex 2**, p 108).

Plaintiff Iliades was specifically instructed and trained regarding the general purpose and function of the light curtain and the serious dangers associated with any human entry into the operating area while a press was in automatic mode and was explicitly instructed that the light curtains, such as installed on Press No. 25, were not and should not be relied upon as am emergency stop switch (Mejia Dep, **Ex 7**, p 24[7]; Whiteside Dep, **Ex 3**, pp 7-9, 13-19[8]).

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[7]

Q When you trained operators Mr. Mejia, did you tell them whether or not it was okay to use the light curtain routinely to stop the machine?
A Yes, sir. That's a no-no. That's the first thing they tell you when you get here.
Q Why is that?
A Because it's not an emergency stop switch. There's no guarantee it's going to stop it. That's what it's there for, but it's not a guarantee. We have emergency stop buttons and we have our power button. You turn your pump off if you have to.

[8]

Q Did you explain to Mr. Iliades the importance of the light curtain?
A Yes
Q What did you tell him about that?
A Do not bypass the light curtain. To always use the light curtain. That's the main safety thing is to use the light curtain. . . . Once you break the light curtain, of course, if you're going in the press, you know, and then you put it on – well, you put it on manual, but the light curtain is a safety device, so to stop the press.
Q Is the light curtain, as you under – is the light curtain supposed to be used as an on/off switch?
A No. No. It's a safety device to prevent the press from moving while you're in there while its on manual. So it's a safety device is what it's for, not to bypass or go inside the press and use it as an off switch.
Q So if I understand correctly, before for whatever reason, before an operator is supposed – can reach inside the press, he has to turn it to manual.

A They have to put it on manual. Cannot go inside the press without putting it on manual.
Q Why can't you reach inside the press when it's in the automatic mode?
A Because you could get injured.
Q Did you explain this to Mr. Illiades?
A Yes
. . .
Q Is it correct to say that reaching inside the press when its in automatic mode for whatever reason without putting it in manual could be dangerous?
A Extremely dangerous.
Q Did you explain at some point during the training of Mr. Iliades that reaching inside the press during the automatic mode when it was running was extremely dangerous?
A Yes, and unacceptable.

Plaintiff Iliades admitted under oath (Iliades Dep, Ex 2, p 108[9]) that he knew:

- the light curtain was a safety device designed to protect operators standing at the front of a molding machine; and,
- unless the machine was manually stopped, the press would automatically re-engage once there was no longer a foreign object within the press front opening area targeted by the light curtain.

Unfortunately, on June 10, 2011, Iliades indisputably ignored, and, indeed, deliberately disobeyed, his instruction and training when he elected to climbed into the molding machine to reach parts located in an area outside that targeted by the light curtain without first placing the

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Q Did you figure out from your training that this light curtain was a safety device?
A Yes
Q Am I correct that if, for whatever reason, you put part of your body through the light curtain and the press stopped, your were required to push the start button in order to get it going again?
A If it stopped in-between a cycle, it would start back up on its own.

press into manual operation (Green Dep, **Ex 11**, pp 14-17, 20-21[10], 26-28 [11]; Richter Dep, **Ex 12**, pp 34-35; **Ex 13,** Richter Reports dated 6/11/11 (L100)[12] and 6/17/11 (L92)[13]; Dep of Plt's Expert Barnett, **Ex 15**, pp 49-55[14]; Barnett Report, **Ex 16**).

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Q And the location of these various components, are you saying your belief is that Mr. Iliades, Steve had gotten completely past the light curtain?
A That is my belief. Yeah.
Q And the light curtain had then cleared itself?
A Correct.
Q And this machine was designed such that once the light curtain cleared itself, it would start up in automatic again?
A It would start up in automatic again.
Q And from your experience as a supervisor, all of the press operators knew exactly that, that once a light curtain cleared, a press would start up again.
A Yeah. . . . It's part of the training.
Q To put this another way, is it your belief that in effect Mr. Iliades had climbed inside the operating area of the press?
A He went inside the front of the press to retrieve a part and by his leaning in so far he cleared the curtain . . . So on this particular press, if you go in so far and the position of the light curtains are as such, which unfortunately no one should do. You never – you never enter the front of the press as part of the training we give to the employees. If you're going to retrieve parts you go in through the back of the press or there's a side door that you can open up on either side of the press to retrieve parts.
Q And of course you're never supposed to go inside a press when it's on automatic, are you, sir?
A No. No. No way. No way.

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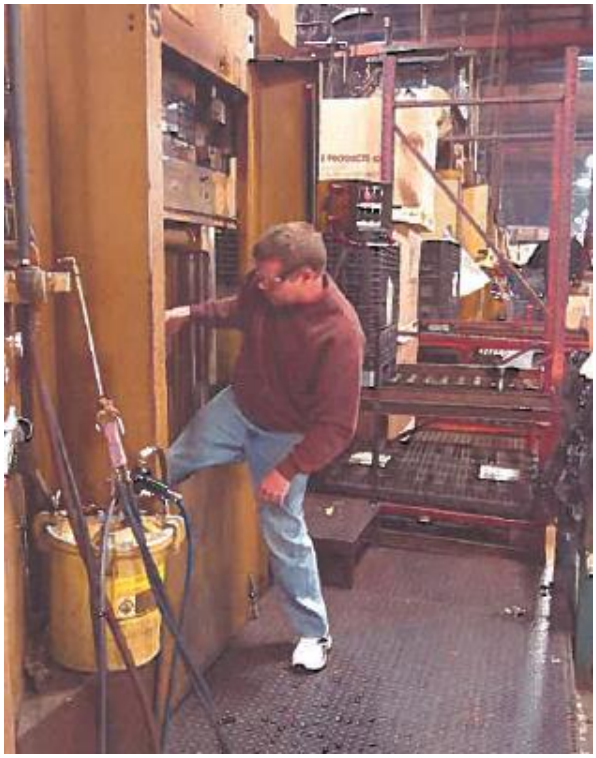
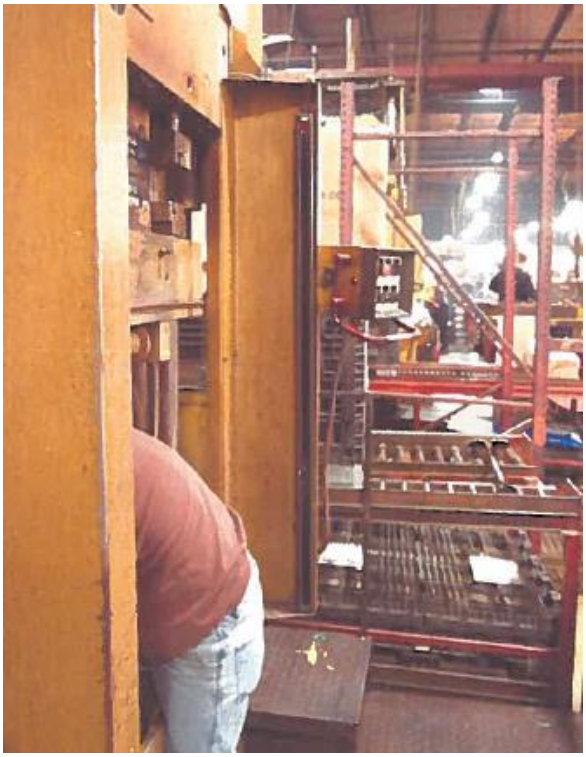
Q Is it fair to say based on your experience as a supervisor and your work training others as well as what you learned from this accident . . . do you believe that Mr. Iliades violated a number of safety rules that lead to him being hurt?
A Yeah, you could say that.
Q And to be specific, sir, am I correct that operators, including yourself, are trained not to try and recover parts from the press when it's running in automatic?
A That's correct.
Q And they're also trained not to recover parts by reaching inside the front of the machine?
A That is correct. . . . Well, you can if the press has completed its downward motion and the press is all the way open and it's stopped.
Q It would not be in automatic at that point, it would be stopped.

A It would be stopped completely. . . . And if you're going to retrieve a part, before you do it you take the press out of automatic event – even in the open position.
Q Turn the switch to manual.
A Turn the switch to manual. Don't even enter a press with it being in automatic. That's one of our common training features.
. . .

Q Is it also correct, that based on your training and how you've trained others and your experience as a supervisor, that press operators are not supposed to use that light curtain as an on/off button or as a means to stop the press?





A The light curtain is there for an additional safety feature, to disable the press when it's in an automatic mode. That's what it's there for, and it's been my experience from a supervisor and a press that when you go into the curtain, it does what it's supposed to do, it stops the press from moving, and if you're going in there and the press is in automatic, you're going in at your own risk, you know, you just don't do that.

[12] "The patient [Steven Iliades] was examined and the chart was reviewed. The case discussed with the staff. This is a 49-year-old right handed married gentleman who lives with his wife in a two story home. There are two steps to enter. He can stay on the first floor if need be. He was at work. He was working on a press. Apparently there was some difficulty with some machine. He went in to try to get it out. He had his left foot on the ground. His right leg was inside as well as his torso." (emphasis supplied)

[13] "This is a 49-year-old right handed married gentleman who lives with his wife in a two-story home with two steps to enter. He can stay on the first floor. He was admitted after a crush injury at work. He was trying to get some material out of a press machine. He just had his left foot on the floor, the rest of his body was inside and he got pinned down with about 1500 lbs." (emphasis supplied)

[14]

Q Now as of the date that you prepared your opinions, tell me what was your understanding of how the accident occurred?

A My understanding was the following: That someplace during the automatic cycle, the plaintiff had reached through the light curtain, which shut off the machine, part of his body was out of the machine, part of his body was inside the machine, and he got to a place where his body no longer blocked the light curtain, and the unit descended on him. . . .

Q Did Mr. Iliades – based on your view of the accident, did Mr. Iliades climb part way into the machine?

A Yes.

The above photos, attached as **Ex 14** illustrate how Mr. Illiades improperly entered Flexible Product's Press No. 25 by bypassing the light curtains (See also: Dep. of Def. expert Ver Halen, **Ex 8**). It is undisputed that the light curtain functioned properly and as intended on 6/10/11 - the date Iliades sustained injuries after climbing into the press (**Ex 6,** pp 93-94).

Dieffenbacher has never received a report of an injury on one of its rubber injection molding machines as a result of an operator climbing into the operating area and bypassing a light curtain (Brumaru Aff, **Ex 5**, ¶ 4[15]; **Ex 6**, pp 103-104; Def's Ans to Plts' First Set of Interrogatories, **Ex 19**, Answer No. 15). Additionally, Dieffenbacher has no reason to anticipate that a press operator would climb inside one of the presses while it was running in automatic mode (**Ex 5).**

Neither Plaintiffs' nor Defendant's expert witnesses are aware of any cases of injuries involving a rubber injection molding machine with a light curtain occurring as a result of an operator deliberately climbing part way into the machine (**Ex 6**, pp 103-104; **Ex 15**, p 87; Def's Answers to Expert Witness Interrogatories, **Ex 20**, Answers 4-5).

Circuit Court Proceedings

On September 17, 2012, Plaintiffs instituted the instant civil product liability action asserting theories of Negligence, Gross Negligence, Breach of Warranty, and Loss of Consortium (Complaint[16]). With respect to the Defendant manufacturer, Plaintiffs allege liability on the basis that: the light curtain was negligently designed; and, Dieffenbacher negligently failed to warn and instruct purchasers as to safe use of the press (Complaint).

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[15] "During the years I worked for Dieffenbacher, we never received a report of an injury on a 500 or 800 ton press, or on any rubber injection molding press manufactured by Dieffenbacher, NA, as a result of an operator climbing part way inside the press during normal (automatic) operations. There is no conceivable reason for an operator to climb inside one of these presses while it is running. Because our company here in Windsor, Ontario is a relatively small facility (I am the only electrical engineer on staff directly familiar with the operations of rubber injection molding machines), I would have learned of any report of injury received by the company." (emphasis supplied)

[16] The original Defendants also included parts and service suppliers Sherdil Precision, Inc., and Leuze Electronic, Inc., but these Defendants were subsequently dismissed (Circuit Court Orders dated 10/16/13 and 8/7/13; Mt Trans 9/17/14, p 14).

Plaintiffs' duty to warn claims were initially dismissed on the basis of the sophisticated user defense provided under *MCL §600.2947(4).* (Mt Trans 9/17/14, p 6; Motion in Limine filed 4/4/14, **Ex 21**; Circuit Court Order dated 7/9/14, **Ex 22**).

Dieffenbacher sought summary dismissal of the remaining defective design claims pursuant to *MCR 2.116(C)(10)* on the basis that, as a matter of law, Steven Iliades engaged in unreasonable and unforeseeable product misuse, as defined in the absolute defense provided to manufacturers under *MCL §600.2947(2)* and *MCL §600.2945(e)*, by climbing partially into a Dieffenbacher 500 ton rubber molding press without switching the machine from automatic to manual mode and while assuming a light curtain would act as an emergency stop switch, because, as a matter of undisputed fact, Iliades' intentional conduct is unprecedented, contrary to common practice, and in complete disregard of the instructions and training provided received by Iliades (Mt Trans 9/17/14, pp 3-7). The Defendant attached numerous affidavits, depositions, admissions and voluminous documentary evidence in support of its dispositive motion.

In response, Plaintiffs conceded that Mr. Iliades intentionally placed a great deal of his body into the operating press beyond the area targeted by the light curtain, but maintained that summary dismissal was precluded by the disputed issues of:

- whether operators were supposed to reach any body part into the press opening, in general; and, therefore, in particular,
- whether Illiades' particular misuse was reasonably foreseeable.

(Mt Trans 9/17/14, pp 7-13).

Plaintiffs also supplied the Circuit Court with affidavits, depositions, and documentary evidence.[17]

[17] In responding to Defendant's Motion for Summary Disposition, Plaintiffs submitted an affidavit from expert Barnett, dated May 28, 2014 (**Ex 17**). This affidavit was submitted more than 60 days after the close of discovery and

Based upon the relevant and undisputed evidence in the record, the Circuit Court determined that application of *MCL §600.2945(e)* and *§2947(2)* mandated summary disposition of Plaintiffs' remaining claims against Dieffenbacher because the undisputed evidence established that:

- Steven Iliades engaged in product misuse as defined by statute by climbing partially into the operating area of the machine while it was automated mode under the assumption that the light curtain would act as an emergency stop which since this action was in total disregard of the on-the-job training and instructions Iliades received from his employer,
- Iliades' misuse was manifestly unforeseeable and unreasonable being unprecedented and in absolute disregard for his own safety (Mt Trans 9/17/14, pp 13-15, 16-17[18]).

Court of Appeals Proceedings

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set forth ten (10) previously undisclosed opinions. On July 23, 2014, the Circuit Court entered an Order in Limine which deemed Barnett's new/undisclosed opinions as inadmissible (Order dated dated July 23, 2014, **Ex 18**).

[18] "The Court, having reviewed the parties' respective motions, response, reply briefs in support and supporting documentation, considering the evidence –excuse me, the arguments presented by counsel, as well as viewing the evidence in the light most favorable to plaintiffs, finds that plaintiff, Steven [Iliades], misused the molding press machine in question, and furthermore, that plaintiff, Steven's, misuse of the subject molding press machine at the time of the subject incident, was not reasonably foreseeable by defendant, Dieffenbacher.

The undisputed testimony in this case reveals that plaintiff, Steven's employer trained plaintiff not to reach into the operating area of defendant's press while in automatic mode. Plaintiff, Steven, had full knowledge that three separate emergency stop devices existed on the subject press to remove the machine from automatic mode, that the light curtain is not to be used as an emergency stop switch because there is no guarantee that the press will stop, and that a switch existed on the subject press to place the machine into manual mode to allow him to reach into the machine.

Moreover, plaintiff, Steven [Iliades], had full knowledge of that -- of the fact that if he tripped the light curtain and then cleared it, the subject press machine would automatically begin its operation again, which is specifically what happened in this case.

Finally, plaintiffs failed to present this Court with any evidence to show that defendant, Dieffenbacher, could have foreseen that a press operator would not only reach inside a running press, but actually try to climb even partially into the press as testified to by plaintiff's expert to retrieve a part.

To the contrary, all the evidence shows that plaintiff, Steven [Iliades], completely ignored his, including on-the-job training relative to the proper operation of the subject machine. He not only reached into the operating area of a running press machine, but climbed at least partially into it. It is this Court's opinion that this behavior constitutes unforeseeable misuse pursuant to MCL 600.2945(e)." (emphasis supplied)

A divided Court of Appeals reversed the Order of Summary Disposition and remanded for further proceedings on the merits of the defective design claims against Dieffenbacher (Maj Op, 7/19/16). The majority held that the Defendant manufacturer should have foreseen that, while acting during the course of employment as an industrial press operator, Iliades would intentionally disregard safety training and instructions by partially climbing into an operational press to retrieve wayward finished parts without first manually shutting down the press. Id. The majority panel reasoned that, as a matter of law and public policy: the refusal of product users to obey safety training, warnings or instructions does not constitute *per se* product misuse; and, ordinary negligence on the part of product users is *per se* foreseeable. Id.

Essentially, the panel majority determined that questions of fact preclude application of *§§2945(e)* and *2947(2)*, a determination supported by tortuous reasoning referencing selective and often immaterial portions of the record[19] and citing little and largely inapt legal authority[20] (Majority Opinion, 7/19/16, pp 3-5). Most egregiously, the majority failed to apply, let alone reference, established principles of statutory construction and wholly ignored persuasive case law applying these principles to *§§2945(e)* and *2947(2)* (Maj Op 7/19/16).

The dissenting judge agreed with the majority that "some manner of accidental or nonaccidental reaching into a press while the press is an automatic mode was reasonably foreseeable" (Diss Op 7/19/16, p 2). However, the dissent was compelled by relevant Michigan

[19] For example, the majority notes in passing, without citation to the record, that another operator had testified that that Press No. 25 featured "a gap between the curtain and the press opening … and someone thin enough could even stand between the light curtain and press opening without interrupting the beam, so the press could cycle." (Maj Op, p 2). The other operator referred to by the majority is James Preston who actually testified that, on a single occasion, he had been able to stand entirely outside the press but inside the light curtain, thus preventing the light curtain from stopping the press (Preston Dep, **Ex 23**, pp 44-47). Notably, Preston also testified that: he was not injured during this single event; he did not report the unusual occurrence to his supervisor; and, significantly, Steven Iliades would not have been able to perform the same feat because he "was a little bit bigger . . . he was more of a bulkier guy in stature . . . ." (**Ex 23**, pp 44-47).

[20] The majority relied solely upon three cases addressing the foreseeability of criminal acts, the distinction between ordinary and gross negligence under criminal law when testing foreseeability, and the sophisticated user defense (Maj Op, pp 3-4).

case law authority to conclude that Mr. Iliades' decision to climb partially into the operating area of the press while it was in automatic mode and while assuming that the light curtain would stop reactivation was unreasonable and unforeseeable product misuse given: the absence of evidence that this particular product misuse and same/similar injuries had occurred previously; and the undisputed evidence that the particular product misue was absolutely contrary to explicit training and instruction provided to Iliades (Dissenting Op 7/19/16, pp 1-3[21]).

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[21] "Plaintiff's action of partially climbing into the press constituted a misuse of the press. The evidence established that plaintiff acted contrary to the instructions provided by a person with knowledge or training regarding the use of the press. According to plaintiff, he reached into the press to retrieve parts. His torso and back were inside the press. Plaintiff testified during his deposition that his left foot remained on the platform and his right knee "leaned in" onto the guard or the metal skirting on the front of the press so that he could reach further into the press. Plaintiff's conduct was contrary to his training. The type of press used by plaintiff may operate in either manual mode, in which an operator must push a button or move a joystick with regard to every motion made by the press, or automatic mode, in which the operator initiates a cycle and then the press moves without additional actions by the operator. Plaintiff's supervisor, Charles Green, found plaintiff trapped in the press while the press was in automatic mode.

Joe Whiteside, a trainer who worked for Flexible Products for 17 years and who operated a press every day for 15 years, was the person who trained plaintiff. Whiteside trained a number of other people before training plaintiff. Whiteside trained plaintiff never to reach inside the press when it is in automatic mode. Instead, he explained that an operator must put the press in manual mode before going inside it. He explained during his deposition, 'There's two main rules. One is to always, whenever you're going inside the press, to ensure that it's on manual . . . .' With regard to the light curtain, Whiteside told plaintiff, 'Do not bypass the light curtain.' He explained during his deposition that the light curtain is a safety device and that an operator must put the press in manual mode before going into the press regardless of the light curtain because the light curtain was not designed to be an 'on/off switch.' He also explained that it is unnecessary to reach into a press to pull out a part while the press is in automatic mode because clean-up occurs at the end of the shift. Plaintiff did not contradict Whiteside's testimony in his deposition. Although plaintiff testified that he was never told that he could not reach into the press and that '[t]he emphasis was put on a light curtain,' plaintiff did not indicate that Whiteside instructed him that he could reach into the press without putting the press in manual mode or that he could partially climb into a press in order to obtain a part. Therefore, the evidence established that plaintiff was instructed not to reach into a press without putting it in manual mode and not to use the light curtain as an on/off switch.

It is clear that plaintiff used the press contrary to the warnings and instruction provided by Whiteside. Whiteside is a person who possessed knowledge or training regarding the use of the product through the 15 years he worked continuously with the presses and through his experience as a trainer. Whiteside instructed plaintiff not to reach into a press when it is in automatic mode and not to bypass the light curtain. I conclude that the evidence established that plaintiff misused the press by partially climbing into the press to retrieve parts while the press was in automatic mode. See MCL 600.2945(e).

The trial court also did not err in concluding that the misuse was not reasonably foreseeable. I agree with the majority that some manner of accidental or nonaccidental reaching into a press while the press is in automatic mode was reasonably foreseeable, which is why the light curtain was installed. However, I disagree with the majority's conclusion that plaintiff's act of partially climbing into the press while the press was in automatic mode was reasonably foreseeable.

First, there is no indication that this type of incident ever occurred before. The light curtain on Press Number 25 was installed in 1997. There is no evidence that any other injuries occurred from an operator partially climbing into a press during the over 13-year period that the light curtain system was in place before plaintiff's accident. Several

The Defendant Dieffenbacher now seeks Supreme Court review and reversal of the majority opinion of the Michigan Court of Appeals.

witnesses testified that they had not received a report of another incident occurring under similar circumstances. James Michalak, a maintenance general supervisor, was unaware of any press operator climbing into a press in order to retrieve parts. The majority alludes to the fact that a regular operator of Press Number 25 noticed that the press would clear even if something traversed the press opening. James Preston, a production supervisor who had used Press Number 25 in the past, testified in his deposition that the light curtain reset when he leaned into or reached into the press to obtain a runner. He admitted that his action of standing inside the light curtain was contrary to his training and that he 'wasn't supposed to be doing that.' Preston also explained that he did not inform his supervisor regarding the issue. Instead, the issue seemed to only happen with Preston because he was 'so skinny,' and he was the only one who encountered the issue with the press. Furthermore, Preston did not testify that he partially entered the press by lifting one leg onto the ledge of the press in the manner that plaintiff did, instead testifying that he reached into or leaned into the press. Consequently, there is no indication that anyone had ever suffered the type of injury that plaintiff suffered as a result of climbing partway into the press.

Second, there is no indication that climbing or partially climbing into a press from the front while the press is in automatic mode was common practice, and the fact that press operators relied on the light curtain to stop the press does not establish that plaintiff's conduct was reasonably foreseeable. The majority concludes that the evidence created a genuine issue of fact regarding whether the press operators could practically remove the finished products from the presses without reaching into the presses. There is no dispute that the operators were required to obtain parts from inside the press on occasion. However, the operators were required to put the press in manual mode beforehand in order to prevent the press from cycling while the operator was reaching inside it. The majority further concludes that press operators routinely relied on the light curtain when removing finished products from the presses. While it is true that there was evidence indicating that the press operators relied on the light curtain to stop a press in order for the operators to momentarily reach into the press and remove parts, there was no indication that the press operators routinely climbed or partially climbed into the press through the front opening in order to obtain parts while the press was in automatic mode[1]. In fact, there appears to be no legitimate reason why a press operator would partially climb into a press while it was cycling in automatic mode. Therefore, I conclude that plaintiff's conduct was not reasonably foreseeable. See MCL 600.2947(2). Accordingly, I would affirm the trial court's order granting summary disposition in favor of defendant

[1] Plaintiff put his upper body and torso inside the press, and he placed his right knee onto the metal skirting on the front of the press. The press came down onto plaintiff's lower back and pushed his chest into his thigh. As a result, plaintiff's lower back and knee were injured. The location and extent of plaintiff's injuries highlight the fact that he went grossly beyond merely placing his hand into the press, which is reasonably foreseeable behavior, and instead partially climbed into the press, which is not reasonably foreseeable behavior.

STANDARDS OF APPELLATE REVIEW

The Michigan Supreme Court conducts a *de novo* review over issues of statutory construction. *Gardner v Dep't of Treasury, 498 Mich 1, 5; 869 NW2d 199 (2015); LaFontaine Saline Inc v Chrysler Group, 496 Mich 26, 34; 852 NW2d 788 (2014).*

The Supreme Court also conducts *de novo* review over orders of summary disposition. *Rambin v Allstate Ins Co, 495 Mich 316, 325; 852 NW2d 34 (2014); Latham v Barton Malow Co, 480 Mich 105, 111; 746 NW 2d 868 (2008), reh den, 481 Mich 882; 748 NW2d 878 (2008); Brown v Brown, 478 Mich 545, 551-552; 739 NW2d 313 (2007).*

A motion for summary disposition brought pursuant to *MCR 2.116(C)(10)* tests the factual basis of claimants' theories. A reviewing court examines the pleadings, affidavits, depositions, admissions, and any other documentary evidence in the record, in the light most favorable to the non-movant. *Rambin, supra; DeSanchez v State, 467 Mich 231, 235; 651 NW2d 59 (2002); Coblentz v City of Novi, 475 Mich 558, 568; 719 NW2d 73 (2006), reh den, 477 Mich 1201; 720 NW2d 743 (2006).*

Once a party files a verified motion for summary disposition pursuant to *MCR 2.116(C)(10),* documenting entitlement to entry of an immediate judgment as a matter of law, the burden of proof shifts to the non-movant to demonstrate, via admissible documentary evidence, the existence of a genuine and material question of fact for the jury at trial. *MCR 2.116(G)(4), (6), (11)*; *Coblentz, supra* at 569; *Barnard Mfg Co, Inc v Gates Performance Eng, Inc, 285 Mich App 362, 370, 373; 775 NW2d 618 (2009), lv den, 485 Mich 1127; 779 NW2d 515 (2010).* The movant is entitled to a judgment as a matter of law where the proffered evidence fails to establish genuine and material questions of fact. *MCR 2.116(C)(10), (G)(4)*; *Rambin, supra; West v General Motors, 469 Mich 177, 183; 665 NW2d 468 (2003); Maiden v Rozwood, 461 Mich 109, 120; 597 NW2d 817 (1999).*

ARGUMENT:

AS A MATTER OF LAW, THE DEFENDANT DIEFFENBACHER IS ENTITLED TO SUMMARY DISPOSITION PURSUANT TO *MCR 2.116(C)(10)* ON THE BASIS THAT PLAINTIFF STEVEN ILIADES ENGAGED IN UNREASONABLE AND UNFORESEEABLE PRODUCT MISUSE, AS DEFINED IN THE ABSOLUTE LEGAL DEFENSE PROVIDED TO MANUFACTURERS UNDER *MCL §600.2947(2)* AND *MCL §600.2945(E),* BY CLIMBING PARTIALLY INTO RUBBER MOLDING PRESS WITHOUT SWITCHING THE MACHINE FROM AUTOMATIC TO MANUAL MODE BECAUSE, AS A MATTER OF UNDISPUTED FACT, ILIADES' INTENTIONAL CONDUCT IS UNPRECEDENTED AND IN COMPLETE DISREGARD OF THE INSTRUCTIONS AND TRAINING PROVIDED BY ILIADES' EMPLOYER

Introduction

This appeal presents critical issues of law and public policy regarding the proper judicial construction of the misuse defense set forth in Michigan's Products Liability Statute, *1995 PA 249; MCL §600.2945, et seq*. This remedial legislation states in pertinent part, emphasis supplied:

> **§600.2945. Definitions.**
>
> As used in this section and sections 1629, 2945 to 2949a, and 5805:
>
> **(a)** 'Alteration' means a material change in a product after the product leaves the control of the manufacturer or seller. Alteration includes a change in the product's design, packaging, or labeling; a change to or removal of a safety feature, warning, or instruction; deterioration or damage caused by failure to observe routine care and maintenance or failure to observe an installation, preparation, or storage procedure; or a change resulting from repair, renovation, reconditioning, recycling, or reclamation of the product.
>
> ***
>
> **(d) '**Gross negligence' means conduct so reckless as to demonstrate a substantial lack of concern for whether injury results.
>
> **(e) '**Misuse' means use of a product in a materially different manner than the product's intended use. Misuse includes uses inconsistent with the specifications and standards applicable to the product, **uses contrary to a warning or instruction provided by the manufacturer, seller, or another person possessing knowledge or training regarding the use** or maintenance **of the product**, **and** uses **other** than those for which the product would be considered suitable **by a reasonably prudent person in the same or similar circumstances**.
>
> ***
>
> **(g) '**Product' includes any and all component parts to a product.
>
> **(h) '**Product liability action' means an action based on a legal or equitable theory of liability brought for the death of a person or for injury to a person or damage to property caused by or resulting from the production of a product.

> **(i)** 'Production' means manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, inspection, testing, listing, certifying, warning, instructing, marketing, selling, advertising, packaging, or labeling.
> **(j) '**Sophisticated user' means a person or entity that, by virtue of training, experience, a profession, or legal obligations, is or is generally expected to be knowledgeable about a product's properties, including a potential hazard or adverse effect. An employee who does not have actual knowledge of the product's potential hazard or adverse effect that caused the injury is not a sophisticated user.

§600.2947. Product liability action; liability of manufacturer or seller.

> **(1)** A manufacturer or seller is not liable in a product liability action for harm caused by an alteration of the product unless the alteration was reasonably foreseeable. Whether there was an alteration of a product and whether an alteration was reasonably foreseeable are legal issues to be resolved by the court.
> **(2)** A manufacturer or seller **is not liable** in a product liability action for harm caused by **misuse** of a product unless the misuse was reasonably foreseeable. Whether there was misuse of a product and whether misuse was reasonably foreseeable are **legal issues** to be resolved by the court.
> **(3)** A manufacturer or seller is not liable in a product liability action if the purchaser or user of the product was aware that use of the product created an unreasonable risk of personal injury and voluntarily exposed himself or herself to that risk and the risk that he or she exposed himself or herself to was the proximate cause of the injury. This subsection does not relieve a manufacturer or seller from a duty to use reasonable care in a product's production.
> **(4)** Except to the extent a state or federal statute or regulation requires a manufacturer to warn, a manufacturer or seller is not liable in a product liability action for failure to provide an adequate warning if the product is provided for use by a sophisticated user.
> **(5)** A manufacturer or seller is not liable in a product liability action if the alleged harm was caused by an inherent characteristic of the product that cannot be eliminated without substantially compromising the product's usefulness or desirability, and that is recognized by a person with the ordinary knowledge common to the community.

The specific issue presented is whether a product manufacturer is entitled to the absolute legal defense set forth in *§§2947(2)* and *2945(e)* where the evidence conclusively establishes that the particular conduct engaged in by the product user was entirely unprecedented, absolutely contrary to common practice, in complete derogation of explicit safety instructions and training

received by the user, and would be considered manifestly dangerous by anyone with an ounce of common sense.

As has already been discussed, there are a total of five Court of Appeals' opinions addressing judicial enforcement of the statutory unforeseeable misuse defense and all of them, including the opinion in this case, are unpublished. Hence, none of the existing decisions constitute binding precedent. *MCR 7.215(C)(1); Aroma Wines & Equip, supra.*

Additionally, the decision by the Court of Appeals majority in this case to reverse the grant of summary disposition based upon the unforeseeable misuse defense directly conflicts with the four other Court of Appeals' opinions which unanimously concluded that the civil liability of products manufacturers is **negated**, as a matter of law, where the evidentiary record, such as in this case, establishes that the particular product use was indisputably unique, significantly diverged from usual practice, violated clear safety instructions and training actually received by the user, and would be considered patently hazardous under any measure of reasonableness (Again, compare: Majority Opinion dated 7/19/16 with *Citizens Ins Co of Am v Prof'l Temperature Heating & Air Conditioning, supra; Walton, supra; Fjolla, supra; Davis-Martinez, supra.* The Court of Appeals majority here reached an absolutely inapposite conclusion, reasoning that

The bottom line: there is a complete absence of consistent and binding case law authority to guide the bench, bar and interested parties with respect to the expected and proper application of *MCL §600.2945(e)* and *MCL §600.2947(2).*

As will be demonstrated, Supreme Court intervention is not only justified by the need for a definitive rule of law, but also by a review of the language and legislative history of Michigan's Products Liability Statute and controlling and persuasive legal authority which, together, compel the conclusion that the Court of Appeals majority's construction and application of *MCL*

§600.2945(e) and *MCL §600.2947(2)* to the record in this case amounts to clear and reversible error.

Controlling Principles of Statutory Construction

The primary goal of statutory construction is to ascertain and effectuate the Legislature's intent and policy choices. *People v Harris, ___ Mich ___; ___ NW2d ___; 2016 Mich LEXIS 1125, *14 (Nos 149872, 150042, 6/22/16); Gardner, 498 Mich at 6; Aroma Wines & Equip, Inc, 497 Mich at 345.* Unambiguous statutory language serves as the most reliable evidence of legislative intent. *Gardner, supra; Aroma Wines & Equip, Inc, 497 at 346.* Time and again this Court has recognized that, in deference to the Michigan Legislature's status as an equal branch of government upon which the State Constitution has delegated the responsibility for formulating public policy, Michigan courts are obliged to enforce all clear statutory language as written. *Harris, 2016 Mich LEXIS 1125, *14*[22]*, 24-25; Ligons v Crittenton Hosp, 490 Mich 61, 70; 803 NW2d 271 (2011); Lesner v Liquid Disposal, Inc, 466 Mich 95, 101; 643 NW2d 553 (2002); People v McIntire, 461 Mich 147, 153, 159*[23]*; 599 NW2d 102 (1999).* Legislative history can provide valuable insight regarding the purpose behind a particular statutory scheme and the intended meaning behind certain provisions. *Luttrell v Dep't of Corrections, 421 Mich 93, 102-103; 365 NW2d 74 (1984); Wilkins v Ann Arbor City Clerk, 385 Mich 670, 691; 189 NW2d 423 (1971)* ["Courts do not exist in a vacuum. They may take cognizance of facts and events surrounding the passage and purpose of legislation"].

[22] "Our role as members of the judiciary is not to second-guess [the Legislature's] policy decisions or to change the words of a statute in order to reach a different result."

[23] "[I]n our democracy, a legislature is free to make inefficacious or even unwise policy choices. The correction of these policy choices is not a judicial function so long as the legislative choices do not offend the constitution. Instead, the correction must be left to the people and the tools of democracy: the ballot box, initiative, referendum, or constitutional amendment."

All provisions of a statute must be read reasonably and in context, with every phrase, clause and word given the full effect of their commonly understood meanings, and no word or provision rendered surplusage or nugatory. *MCL §8.3a*[24]*; Gardner, supra; McCahan v Brennan, 492 Mich 730, 739; 822 NW2d 747 (2012).* A necessary corollary: "court[s] may read nothing into an unambiguous statute that is not within the the manifest intent of the Legislature as derived from the words of the statute itself." *Roberts v Mecosta Co Gen Hosp, 466 Mich 57, 63; 642 NW2d 663 (2002).*

Undefined terms can be ascertained through recourse to lay and legal dictionaries, prior cases, and, where appropriate, linguistic data bases. *Harris, 2016 Mich LEXIS 1125, *15-19.* However, the Legislature is free to "borrow" legal terms of art and entitled to assume that reviewing courts will construe such terms in a manner consistent with the meaning historically ascribed under common law. *Nummer v Dept of Treasury, 448 Mich 534, 544-545; 533 NW2d 250 (1995); People v Couch, 436 Mich 419, 421; 461 NW2d 683 (1990)*

It is well-established that remedial statutes must be liberally construed in favor of the Legislature's intended beneficiaries. *Chandler v Dowell Schlumberger, Inc, 456 Mich 395, 406; 572 NW2d 210 (1998); Simkius v GMC, 453 Mich 703, 710-711; 556 NW2d 839 (1996); Plymouth-Stamping Div of Eltec Corp v Lipshu, 436 Mich 1, 14; 461 NW2d 859 (1990).*

Finally, scrupulous judicial deference is accorded to statutory amendments which, by their very nature, manifest a legislative intent to effect change. *Huron Twp v City Disposal System, 448 Mich 362, 366; 531 NW2d 153 (1995); Sam v Balardo, 411 Mich 405, 430; 308 NW2d 142 (1981); Bonifas-Gorman Lumber Co v Unemployment Comp Comm, 313 Mich 363, 369; 21 NW2d 163 (1946).*

[24] "All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning."

The History of Michigan Products Liability Law

Prior to December 11, 1978, product liability actions were governed exclusively by common law. *Greene, supra, 475 Mich at 507, 5-8.* Via *1978 PA 495*, which adopted House Bill 5619 and became codified at [then] *MCL §600.2945 et seq* (pertinent portions attached as **Ex 25**), the Michigan Legislature addressed concerns regarding an increase in product liability litigation, the severity of judgments against manufacturers and sellers, and a corresponding lack of available or affordable liability insurance (Analysis for HB 5689 dated 6/30/78, **Ex 26**).

Specifically, the Legislature established certain guidelines for civil product litigation and revised the statute of limitations for such actions (Synopsis of HB 5698 dated 12/7/77, **Ex 27**). These litigation guidelines included the adoption of a statutory definition of "product liability action" (*§2945*) and the creation of an affirmative defense predicated upon admission of evidence of product misuse (*§2947*). The original version of *MCL §600.2947* stated, "[i]t shall be admissible as evidence in a products liability action that the cause of death or injury to a person or property was an alteration or modification of the product, or its application or use, made by a person other than and without specific directions from the defendant." In the original version of *MCL §600.2949,* the Legislature replaced the doctrine of contributory negligence in product actions with a comparative fault system (**Ex 25**). Specifically, evidence of negligence on the part of the injured party, such as product misuse, would "not bar recovery by the plaintiff or plaintiff's representatives" rather, "damages sustained by the plaintiff shall be diminished in proportion to the amount of negligence attributed to the plaintiff (**Ex 25**).

Michigan courts construing the misuse affirmative defense contained within *1978 PA 495 §2947* applied the existing "reasonably foreseeable" common law test which focused upon whether the <u>particular</u> product use/misuse was a common practice <u>and</u> whether the manufacturer was aware of that common practice. See, i.e., *Van Eizenga v Straley, 1998 Mich App LEXIS 1259, *10 (No*

198819, 3/31/98, **Ex 28***),* citing *Portelli v I.R. Construction Products Co, Inc, 218 Mich App 591,599; 554 NW2d 591 (1996).* See also: *Ritter v Emerson Elec Co, 1996 US DIST LEXIS 13925, *4-10 (ED Mich, 8/15/96),* citing *Wells v Coulter Sales, Inc, 105 Mich App 107; 305 NW2d 411 (1981).*

Between 1978 and 1995, product manufacturers, sellers, and the liability insurance industry campaigned for more effective tort liability reforms (Senate Fiscal Agency Committee Summary for Senate Bill 344 dated 5/9/95, **Ex 29**; Senate Fiscal Agency First Analysis for SB 344 dated 8/28/95, **Ex 30**; Senate Fiscal Agency Revised Enrollment Analysis for SB 344 dated 1/11/96, **Ex 31**). In response, the Michigan Legislature passed *1995 PA 249*, effective March 28, 1996, which dramatically strengthened the protections afforded to product manufacturers and sellers under Michigan's Revised Judicature Act.

Specifically, the Legislature amended *MCL §600.2945* to provide an extensive glossary of relevant product terminology, including express definitions of product "misuse". *MCL §600.2945(e).* The Legislature completely overhauled the original version of *MCL §600.2947*, replacing the prior affirmative defense, which allowed the trier of fact to consider evidence of misuse, with absolute immunity from liability unless the presiding judge determined that the particular misuse at issue was "reasonably foreseeable". *1995 PA 249, MCL §600.2947(2).*

The legislative history for *1995 PA 249* plainly documents the Michigan Legislature's concerted efforts to arrive at final public policy decisions only after careful consideration of the competing interests held by business groups, in general, product manufacturers, sellers and liability carriers, product purchasers, and commercial and consumer advocates (**Exs 29-31**). The debate concerning the appropriate statutory reforms in instances of product misuse is especially edifying in this regard:

RATIONALE

The term "product liability" refers to the body of law that governs the liability of manufacturers and sellers of products that are alleged to have caused personal injury or property damage. *According to many, over the past several decades there has been an explosion of product liability litigation, resulting in unfair and excessive judgments against manufacturers and sellers, bankruptcies, reduced capacity of firms to compete internationally, curtailed innovation, reduced funding for research, higher consumer costs, and unaffordable or unavailable casualty insurance*. These circumstances have led to considerable debate at both the Federal and state levels, which escalated in the mid-1980s and continues in the present…. In Congress and state legislatures, a number of proposals have been advanced to reduce manufacturers' and sellers' exposure to liability.

Among the most common recommendations are those that would establish a defense if a product met government standards; if a product were misused or modified by the consumer; if the harm were caused by an inherent characteristic of a product (one that cannot be removed if the product is to serve its function); or if a consumer exposed himself or herself to a known risk.

***

…Many believe that Michigan, too, should take steps to limit the exposure of product manufacturers and sellers, reduce damages awards, and encourage early settlements.

***

Nonliability for Altered or Misused Product. Under the RJA, it is admissible in a product liability action that the cause of the death or injury was an alteration or modification of the product, or its application or use, made by a person other than, and without specific directions from, the defendant. *The bill would* ***delete*** *this provision,* ***and specify instead that a manufacturer or seller would not be liable in a product liability action for harm caused*** *by an alteration or* ***misuse*** *of the product* ***unless*** *the alteration or misuse were* ***reasonably foreseeable****. Whether there had been an alteration or misuse of the product and whether an alteration or misuse was reasonably foreseeable would be* ***legal issues to be resolved by the court****.*

….'Misuse' would mean use of a product in a *materially different manner than the product's intended use. Misuse would include uses inconsistent with the specifications and standards applicable to the product, uses contrary to a warning or instruction provided by the manufacturer, seller, or another person possessing knowledge or training regarding the use or maintenance of the product, and uses other than those for which the product would be considered suitable by a reasonably prudent person in the same or similar circumstances*.

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ARGUMENTS

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Supporting Argument

The bill would do a great deal to address the excesses of tort law, especially in the product liability field. According to an article in *Business Week*, "Each year, over $100 billion flows through the liability system from companies to lawyers and claimants" (7-29-91)…. *As a result, product liability litigation not only has threatened the financial viability of many enterprises, but also has added substantially to the cost and unavailability of many goods and services. The bill would reverse this trend by significantly limiting manufacturers' and sellers' exposure to liability and encouraging early settlements.*

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Supporting Argument

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The bill also would exempt a manufacturer or seller from liability if a consumer voluntarily exposed himself or herself to a known risk. Further, a manufacturer or seller would not be liable for failure to warn unless the plaintiff proved that the manufacturer knew or should have known about the risk based on the information available at the time the product left the manufacturer's control. This would ensure that defendants were not held responsible for hazards that they could not or should not have known about before a product left their control. *In addition, by **precluding liability for harm caused by an unforeseeable misuse** or alteration of a product, the bill would recognize that the manufacturer or seller should not have to bear responsibility for injury attributable to the consumer or others*.

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Opposing Argument

*It would be patently unfair to create an **absolute defense** to liability if a product were altered or misused, except if the alteration or misuse were reasonably foreseeable*. Under the bill's definition of "alteration", even a change in a product's label would immunize the manufacturer from liability…. *Further, the defense for misuse would apply if anyone with knowledge about a product gave a warning or instruction concerning its use. This would be particularly onerous in the context of the **workplace**; if a supervisor gave a worker instructions that a worker forgot to follow, the manufacturer would be immune even if that misuse were predictable. Under current law, a manufacturer may introduce evidence that its product was altered, and a jury may reduce a plaintiff's damages by the percentage of his or her negligence*.

(**Ex 30**, pp 1, 4, 9, 10, 13-14, emphasis supplied in italics and bold)

In short, the legislative history for *1995 PA 249, §§2945* and *2947,* evidences that, instances of unforeseeable product misuse, the Michigan Legislature intended:

- to provide manufacturers with a defense properly characterized as "absolute" or an "exemption" or "immunity" from liability in order to affirmatively limit manufacturers' exposure to excessive liability, particularly in instances where the injury is properly attributable to others;
- to strictly limit the exception for the absolute immunity to "reasonably foreseeable" product misuse, with the Legislature's choice of this legal term of art an indication that the terms must be construed by the courts in a manner consistent with the well-established common law definitions;
- that the unforeseeable misuse defense be decided as a matter of law by the courts.

Especially significant to the outcome in this case: the Michigan Legislature considered, but consciously opted to reject continuing an approach that would allow the trier of fact to consider product misuse as a factor by which to reduce an injured plaintiff's damages.

Equally noteworthy: the Legislature was undeterred by arguments that an absolute product misuse defense would unfairly punish injured workers who would be deprived of any recovery in the event that it was arguably foreseeable that the worker would forget or disregard instructions and training provided by his/her employer.

Finally, and critically, at the time *1995 PA 249, §§2945* and *2947* was deliberated and signed into law, Michigan common law had in place well-established tests for regarding the legal notion of "reasonably foreseeable" in general, and "reasonably foreseeable produce misuse" in particular.

The test of "reasonably foreseeable" for the purposes of civil product liability actions developed under Michigan common law does not allow manufacturers to be held liable for every conceivable or possible product misuse. This Court has consistently and aptly reasoned that such

a broad definition would unjustly expose manufacturers to strict liability for all injuries arising from even improper or dangerous product uses and unduly impair the ability of manufacturers to market their products. *Glittenberg v Doughboy Recreational Ind, 441 Mich 379, 387-389; 481 NW2d 208 (1992); Prentis v Yafe Mfg Co, 421 Mich 670, 683; 365 NW2d 176 (1984); Owens v Allis Chalmers Corp, 414 Mich 413, 432; 326 NW2d 372 (1982).* See also: *Trotter v Hamill Mfg Co, 143 Mich App 593, 602-603; 372 NW2d 622 (1985)* ["From a practical standpoint, it cannot be said that the reinstallation of seat belts {in a different vehicle model} was foreseeable…To hold otherwise would be to impose an intolerable burden on manufacturers"]

Within the specific context of product misuse, the traditional common law test focused upon three factors; to wit:

- the manufacturer's intended use of the product;
- whether the particular misuse was a common practice; and,
- whether the manufacture was aware that the particular misuse was a common practice.

Portelli, 218 Mich App at 596-603; Bazinau v Mac Is Carriage Tours, 233 Mich App 743, 757-759; 593 NW2d 219 (1999) [liability negated for injuries in workplace setting where manufacturer intended and instructed that snow removal vehicle be used to clean sidewalks, only, and manufacturer had no knowledge that employer would instruct employee to drive the vehicle over frozen open water]; *Davis v Link, Inc, 195 Mich App 70, 72-73; 489 NW2d (1992)* [unsafe use not foreseeable where no evidence of manufacturer's actual knowledge of particular misuse and product had been used for over 5 years without incident]; *Mach v GM Corp, 112 Mich App 158, 163; 315 NW2d 561 (1982)* [manufacturer had no knowledge of unusual and dangerous method of jumpstarting bulldozer]; *Wells, 105 Mich App at 117* [submersion of forklift contrary to owner's instructions and not within normal and intended use of vehicle].

Markedly, the Court of Appeals in *Bazinau, supra,* firmly rebuffed arguments that a manufacturer's warnings or cautions against a particular misuse somehow made that misuse reasonably foreseeable. *233 Mich App at 759*[25]. Also especially notable: the *Mach* Court resolutely dismissed the notion that evidence of other common means of jumpstarting a bulldozer thereby rendered reasonably foreseeable the particular, unusual, and exceptionally dangerous jumpstarting method. *112 Mich App at 163-164*[26].

Since the enactment of *1995 PA 249, §§2945* and *2947,* every Court of Appeals panel tasked with construing this amended remedial legislation (with the exception of the panel majority in this case), has:

- continued utilization of the traditional common law "reasonably foreseeable" test; and,
- ultimately concluded that, as a matter of law, manufacturers are entitled to summary disposition on the basis of the **absolute** statutory defense where the particular misuse was unknown and uncommon.

[25] "A manufacturer's prudent warning to caution against inappropriate use of a vehicle should not and does not render the inappropriate use foreseeable. To do so would require manufacturers to design safety devices for every conceivable misuse. This is not the law of Michigan", citing *Owens, 414 Mich at 432* (emphasis supplied).

[26] "On the basis of the above evidence it is clear that no duty to warn existed in the instant case. The danger inherent in jumpstarting a bulldozer while kneeling on its track, without using a remote switch, without setting the parking brake, without an operator in the cab at all times, while leaving the throttle open to two-thirds of full throttle, without insuring that the gearshift lever was completely in neutral, or, better still, that the neutral lock mechanism was engaged, and without employing normal starting procedures was a danger open and obvious to all about which no duty to warn existed.

This Court has also held that there exists no duty to warn if the particular use made of the product and the injuries sustained were not foreseeable by the manufacturer. *Thomas v International Harvester Co, 57 Mich App 79, 81; 225 NW2d 175 (1974)*. The crucial inquiries under this test are whether the use made of the product was a common practice and whether the manufacturer was aware of that use. Although there was some testimony in the instant case that jumpstarting was an ordinary way of starting the machinery, there was no testimony that the peculiar method of jumpstarting used by decedent was a common method. To the contrary, plaintiff's witnesses all testified that the manner in which they would have jumpstarted the bulldozer would have been much different from that used by decedent, and that they would have relied upon the safety features built into the machinery, of which they were all aware. Further, there was no evidence that defendant knew, or should have reason to know, that the precise method of jumpstarting used by plaintiff's decedent was common to the trade. Thus, no duty to warn could be imposed under *Thomas, supra."* (emphasis supplied).

Citizens Ins Co, supra[27]*; Walton, supra; Fjolla*[28]*; Davis-Martinez, supra*[29]. See also: *Johnson v Serv Tool Co, LLC, 2015 US Dist LEXIS 160397(ED Mich, 11/30/15)*[30]*; Presnell v Cottrell, Inc.*,

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[27] "Here, there is no question of material fact that JFA/JAS misused the product, i.e., the drip pan. The boiler instruction manual specifically stated that if a boiler is installed on a combustible floor, the boiler must be raised on a "base of hollow clay tile or concrete blocks from 8" to 12" thick and extending 24" beyond the sides." The record indicates that defendant advised JFA/JAS to raise the boiler on concrete blocks in the drip pan and offered to complete the work. JFA/JAS failed to comply with the instruction manual and with the advice of defendant.

JFA/JAS argue that their alleged misuse was foreseeable because defendant's president and employee knew that JFA/JAS had already rejected defendant's proposal to raise the boiler and drip pan onto concrete blocks, and because defendant's service engineer saw the pan placed on the floor on the day it was installed and in subsequent inspections. We disagree. Plaintiffs do not explain how defendant should have predicted that JFA/JAS would ignore the manufacturer recommendations and ordinary understandings of heat transfer. Plaintiffs do not allege that anyone informed defendant that JFA/JAS planned to use the drip pan directly on the floor, contrary to all recommendations. Although defendant's service engineer subsequently learned about the placement of the drip pan (possibly because he was present during its installation), the pan had already passed to JFA/JAS's ownership and control. We disagree with plaintiffs' suggestion that defendant had a duty to foresee their misuse of the product.

Accordingly, the trial court erred in denying defendant's motion for summary disposition with respect to plaintiffs' product liability claims. *MCL 600.2947(2)*." (*Id at *21-23,* emphasis supplied)

[28] "Plaintiff does not contest that he was using or maintaining the forklift at the time of the accident. Nor does plaintiff challenge defendants' assertion that his use of the screwdriver amounts to misuse of the forklift. Instead, plaintiff argues on appeal that his misuse of the product was reasonably foreseeable. Plaintiff insists that his observation of Bell mechanics using a screwdriver to separate the contactors, and the presence of 'scratches and scrapes' on the 'back cover of the contactors,' demonstrated the reasonable foreseeability of his repair technique. Additionally, plaintiff invokes Blackmore's testimony that, '[W]hen you look at the back cover of the contactors, forward and reverse, there's some distress to the hole where the solenoid plunger sits which would appear that it's been beat on before.'

Viewing this evidence in the light most favorable to plaintiffs, we conclude that plaintiff's misuse of the forklift was not reasonably foreseeable. Plaintiffs have offered no evidence that the trained mechanics plaintiff observed repairing the contactors failed to disconnect the battery cable before using a screwdriver to separate the tips. The existence of "scratches and scrapes" near the access area for the contactor plates may tend to prove that others used screwdrivers in that vicinity, but the presence of these marks does not reasonably evidence that any service occurred without first disconnecting the battery. Plaintiffs have also failed to demonstrate the existence of any other reported injuries caused by an unexpected movement of the forklift, and Blackmore opined that he would consider the forklift 'reasonably safe' if plaintiff's injury constituted the only similar 'failure.'

Although a forklift user might reasonably conclude that turning off the ignition would prevent movement of the truck, we detect no genuine issue of material fact that either Nacco or Alta reasonably should have foreseen that anyone would have attempted to repair an electrical system by employing a screwdriver to separate electrical components, without previously disconnecting the vehicle's battery. The circuit court thus correctly concluded as a matter of law that plaintiff's misuse of the forklift was not reasonably foreseeable. Given these findings, *MCL 600.2947(2)* compels us to conclude that the circuit court properly dismissed plaintiff's product liability claims." (*Id at *12-14,* emphasis supplied)

[29] "We next reject plaintiffs' assertion that the evidence raises a question of fact as to whether the misuse of the lock for weight-bearing purposes was foreseeable…..

We find no error in the trial court's determination that the misuse of the lock in question forweight-bearing purposes was not foreseeable. Plaintiff presented no evidence that defendants should have been aware that freestanding chains and padlocks were used to supplement the chain and "S" hook configuration designed by manufacturers of tree stands. *MCL 600.2947(2)*; *Greene, supra at 408-409*….

2013 US Dist LEXIS 34032 (ED Mich, 3/8/13)[31]*; Cobb v Schwing Am Inc, 2006 US Dist LEXIS 8648 (ED Mich, 2/13/06)*[32].

We further find that the trial court properly granted summary disposition because legally plaintiff misused the lock at issue here by utilizing it to secure his personal safety. Locks are designed as anti-theft devices intended to provide security for property. In this case, no evidence established that plaintiff's alternate use to secure his personal safety was one that others considered to be suitable for locks and, therefore, plaintiff's use of the lock for weight bearing purposes cannot be considered reasonably foreseeable. *Id*; *MCL 600.2947(2)* and *MCL 600.2945(e)"* (*Id at *11-13*, emphasis supplied)

[30] "Drawing all reasonable inferences in favor of Plaintiff, the evidence fails to establish that the hunting community commonly uses ratchet straps to replace treestand support straps. Exhibit 3 of Plaintiff's response discloses a treestand using a ratchet strap as part of its original equipment. (Doc. 18, Ex. 3, at 14). However, nothing in the submitted manual suggests that the strap can be replaced by non-original manufacturer equipment designed for a different purpose. On the contrary, the user manual specifically warns, 'REPLACE any damaged or worn part with original parts . . . Failure to follow these instructions may result in serious injury or death!' (Doc. 18, Ex. 3, at 3). Exhibit 4 of Plaintiff's response discloses a cargo tie-down strap with a camouflage pattern that, according to Plaintiff, implies the strap's deer hunting applications. (Doc. 18, Ex. 4). While the camouflage pattern may suggests the strap's popularity in the hunting community, to draw the inference of its suitability to support a treestand from the strap's pattern requires the Court to fill in a logical gap that is too significant to be reasonable. Exhibit 5 of Plaintiff's response discloses Gear Tree Stand Ratchet Straps that are suitable for "strapping cargo onto trucks, trailers and ATVs". (Doc. 18, Ex. 5, at 2). While this evidence establishes that a treestand strap may be used as a cargo strap, nothing suggests that the inverse is true. Taken together, the evidence fails to establish even a single instance of a cargo tie-down strap being used as a treestand support strap prior to this case, let alone establish that it is a common practice in the deer hunting community.

Even assuming that the hunting community commonly uses ratchet straps to replace treestand support straps, it does not follow that a reasonably prudent person would consider Plaintiff's use of the subject Regal Strap suitable in this case. The instructions and warnings clearly indicate that the Regal Strap can be used only as a cargo tie-down strap. Plaintiff supplies no evidence to indicate that a reasonably prudent person or a person from the hunting community would overlook or ignore such clear instructions and warnings. For these reasons, the Court finds that Plaintiff's use of Regal Strap constitutes a misuse under *Mich. Comp. Laws §600.2948(2).*

Next, the Court must determine whether this misuse was reasonably foreseeable. To determine the foreseeability of a misuse, the crucial inquiry is (1) whether the use made of the product was a common practice, and (2) whether the manufacturer was aware, or should have been aware, of that use. *Gootee v. Colt Indus., Inc., 712 F.2d 1057, 1065 (6th Cir. 1983)* (citing *Mach v. Gen. Motors Corp., 112 Mich. App. 158, 315 N.W.2d 561, 564 (Mich. Ct. App. 1982))*.

Plaintiff's misuse was unforeseeable. The evidence purportedly demonstrating the common use of ratchet traps in the deer hunting community establishes, at best, the first prong of the Gootee two-prong test. *712 F.2d at 1065*. However, discovery fails to produce any evidence to establish the second prong that Defendant knew or should have known of the misuse, and Plaintiff does not dispute it in its response. For the reasons above, the Court holds that Plaintiff's use of the subject Regal Strap constitutes an unforeseeable misuse that precludes him from any recovery from Defendant." (*Id at *19-22*, emphasis supplied).

[31] "The operating manual, training materials, and safety documents of the trailer specifically instruct its operators not to jump on the trailer. It is not reasonably foreseeable that a user would disregard the operating instructions and engage in an obviously dangerous activity. *See Cobbs v. Schwing America, Inc., 2006 U.S. Dist. LEXIS 8648, 2006 WL 334271 (E.D. Mich. 2006)* (obviously dangerous use of equipment is not reasonably foreseeable). Here, Presnell's misuse of the trailer was not reasonably foreseeable and precludes liability under *Mich. Comp. Laws § 600.2947(2)*."

[32] "...the only feasible explanation which remains as to how Plaintiff's hand entered the inlet area is that he reached his hand twelve inches past the opening's rim, into the poppet valve area. Therefore, by placing his hand into

While unpublished, the Court of Appeals' opinions in *Citizens Ins Co, supra* , *Walton, supra; Fjolla, supra;* and *Davis-Martinez, supra,* can – and should – be considered persuasive because these opinions employ a judicial construction of *MCL §§600.2945 (e)* and *2947(2)* which is fully consistent with:

- the requisite judicial deference required by the well-established principles of statutory construction, *Harris, supra; Ligons, supra; Lesner, supra; McIntire;supra; Luttrell, supra; Wilkins, supra; Nummer, supra; Couch, supra; Chandler, supra; Simkius, supra; Plymouth-Stamping, supra; Huron Twp, supra; Sam, supra; Bonifas-Gorman Lumber Co, supra*:
- the legislative intent behind *MCL §§600.2945 (e)* and *2947(2)* as revealed by the unambiguous statutory language, *MCL §8.3; Harris, supra; Gardner, supra; Aroma Wines & Equip, supra;* ;
- the legislative intent behind *MCL §§600.2945 (e)* and *2947(2)* as in evidenced in enlightening legislative history, (**Exs 25-27, 29-31**); and,
- the historic meaning of "reasonably foreseeable" as this legal term of art has been and continues to be applied in products cases, including those arising out of product misuse, *Glittenberg, supra; Prentis, supra; Owens, supra; Trotter, supra; Portelli, supra; Bazinau, supra; Mach, supra.*

Incidentally, the results and reasoning in *Citizens Ins Co, supra, Walton, supra; Fjolla, supra;* and *Davis-Martinez, supra,* find additional support in opinions issued by sister jurisdictions when confronting product misuse defenses under identical or nearly identical situations. See, i.e.,

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the machine while it was operating, the Court is satisfied that Plaintiff misused the grout pump. In addition, the Court is satisfied that it was not foreseeable that someone cleaning the pump would reach his or her hand into the poppet valve area while it was operating. Consequently, Defendant's Motion for Summary Judgment Regarding Misuse is granted." (*Id at *15,* emphasis supplied).

Broyles v Kasper Mach Co, 865 F. Supp. 2d 887, 894- 900 (SD Ohio, 2012) [products liability claims against manufacturer of industrial molding machine that featured a safety device in the form of a light curtain failed, as a matter of law where the evidence established that, in derogation of training, instructions and warnings, the plaintiff intentionally circumvented the light curtain and entered a dangerous area without first shutting down the machine[33]]; *Burt v Makita USA, Inc, 212 F. Supp 2d 893, 897-899 (ND Ind, 2002)* [manufacturer entitled to absolute defense under product misuse statute when product used in a manner unintended by manufacturer and contrary to warnings and instructions, with the court emphasizing that "the mere possibility of misuse does not render a misuse reasonably foreseeable."]

More to the point, however, application of the correct construction of *MCL §§600.2945 (e)* and *2947(2)* to the record in this case confirms that, as a matter of law, the Defendant Dieffenbacher is absolutely shielded from liability to Plaintiffs under a theory of negligent design.

Proper Construction and Application of *MCL §600.2945(e)* and *MCL §600.2947(2)* Requires Reversal of the Court of Appeals Majority Opinion and Reinstatement of Summary Disposition of Plaintiffs' Negligent Design Claims

Again, under a correct construction and application of the absolute legal defense provided for under *MCL §600.2945(e)* and *MCL §600.2947(2),* the Defendant manufacturer Dieffenbacher is entitled to summary relief on Plaintiffs' product liability claims so long as the evidence establishes that Steven Iliades' conduct on June 10, 2011 amounts to unreasonable and unforeseeable product misuse. Critically, the resolution of this issue is constrained to the

[33] "In this case Plaintiff was well aware of the danger in walking into Bay 26 but chose to proceed, as is demonstrated by his statement provided to the U.S. Department of Labor and his deposition testimony. Plaintiff had the authority, capability, and knowledge to shut down the carousel before he proceeded into the restricted area. He purposefully chose not to do so. There is no reason to believe that the addition of one more tool to stop the carousel would have changed Plaintiff's conscious decision not to use the tools available to shut down Bay 26. There is no way to design a machine that could guard against a person aware of its danger but determined to bypass safety features….. Because Plaintiff was aware of the danger and still chose to bypass the safety measures designed to prevent it, the lack of any additional safety devices suggested by the experts did not proximately cause the accident." (*Id at 899,* emphasis supplied).

examination of Iliades' particular conduct and the specific injuries which resulted. *Citizens Ins, supra; Portelli, supra; Bazinau, supra; Davis, supra; Mack, supra; Wells, supra.*

At the outset, the evidentiary record created before the Circuit Court confirms that the threshold legal test for product misuse has been met in this case.

First, it is undisputed that neither the manufacturer Dieffenbacher nor the purchaser/employer intended that:

- press operators would ever partially climb through the front access and into an operating area while the press was running in automatic;
- press operators would engage in any activity other than removing finished parts through the front access opening and, only then, after the press had stopped following an automatic cycle;
- the light curtain would offer protection to an operator climbing partially inside the machine during an automatic cycle;
- press operators would even contemplate retrieval of wayward finished parts without first placing the press in manual mode;
- the light curtains would serve as an emergency stop switch;
- press operators would rely upon the light curtain as an emergency stop switch under any circumstances.

(**Ex 2,** p 61; **Ex 3**, pp 7-9, 13-19; Ex 5, ¶¶2-4; **Ex 6,** pp 48, 51, 113-115; **Ex 7**, pp 24, 44; **Ex 9**, pp 12-13, 23; **Ex 11**, pp 14-17, 20-21)

Second, the depositions, documentary evidence, and admissions by Plaintiff Iliades and his expert witness, conclusively establish that his particular product misuse was in complete derogation of explicit safety instructions and training received from his employer (**Ex 2**, p 108; **Ex**

3, pp 7-9, 13-19; **Ex 6,** pp 48, 113-115; **Ex 7,** 0 24; **Ex 9,** pp 12-13; **Ex 11**, pp 14-17, 20-21, 26-28; **Ex 12**, p 31; **Ex 13**; **Ex 15,** pp 49-55; **Ex 16**).

Third, the evidentiary evidence confirms that Mr. Iliades' conduct would be considered manifestly dangerous by anyone with an ounce of common sense (**Ex 5**, ¶4).

As a matter of law, Iliades decision to partially climb into the operational molding machine constitutes product misuse for the purposes of *MCL §§600.2945(e) and 2947(2). Citizens Ins Co, supra, Walton, supra; Fjolla, supra;* and *Davis-Martinez, supra; Johnson, supra; Presnell, supra; Broyle, supra; Burt, supra.*

The evidentiary record created before the Circuit Court also confirms that the legal test for unreasonable and unforeseeable product misuse has been met in this case.

As has already been discussed, Iliades' particular misuse of the press was never intended by Dieffenbacher.

Additionally, the record confirms that it was an unheard-of practice for press operators to partially climb into a machine in automatic mode. Specifically, the undisputed evidence is that Iliades accident is the only known or reported incidence of serious bodily injury caused by or associated with an operator partially climbing into an operating press (**Ex 5**, ¶4; **Ex 6**, pp 103-104; **Ex 15**, p 87; **Ex 19**; **Ex 20**). Simply put, Iliades' product misuse on 6/10/11 and the resultant and truly unfortunate injuries were entirely unique and unprecedented. Obviously then, Dieffenbacher had no actual knowledge and was never on notice that it was common for press operators to partially climb into the press, without first shutting down the press by placing the machine in manual mode, in order to retrieve fallen parts.

As such, and as a matter of law, Iliades decision to partially climb into the operational molding machine constitutes product misuse for the purposes of *MCL §§600.2945(e) and 2947(2).*

The Circuit Court readily – and correctly – concluded that the record here easily and completely satisfied the tests for unreasonable and unforeseeable product misuse thus entitling the Defendant Dieffenbacher to the absolute legal defense set forth in *MCL §§600.2945(e) and 2947(2)* (Mt Trans 9/17/14, pp 13-17). Even when viewing the evidence in a light most favorable to Plaintiffs, the Circuit Court reasoned that it was impossible for Plaintiffs to overcome undisputed, and therefore **fatal**, proof that:

- Flexible Products trained Steven Iliades not to reach into the operating area of defendant's press while in automatic mode;
- Iliades knew that three separate emergency stop devices existed on the subject press that were intended to remove the machine from automatic mode and allow operators to safely reach into the machine;
- Iliade knew the light curtain is not to be used as an emergency stop switch because there is no guarantee that the press will stop unless the machine is placed in manual mode;
- Iliades knew that if he tripped the light curtain and then cleared or by-passed it, the machine would automatically reactivate – which is exactly how Iliades was injured; and,
- there is no evidence that Dieffenbacher actually knew or reasonably could have foreseen "that a press operator would not only reach inside a running press but actually try to climb even partially into the press" behavior which amounted to complete disregard for "on-the-job training relative to the proper operation of the subject machine". Id

Before the Court of Appeals, Plaintiffs successfully convinced two members of the panel to hold that the Defendant manufacturer should have foreseen press operator Iliades would intentionally disregard explicit safety training and instructions by partially climbing into an operational press to retrieve wayward finished parts without first manually shutting down the press

and while relying upon a light curtain to somehow transform into a safety switch (Opinion dated 7/19/16, pp 3-5).

The Defendant-Appellant contends that legal analyses and conclusions are so clearly erroneous as to justify Supreme Court review and reversal.

First and foremost, the Court of Appeals majority committed reversible error by holding that, for the purposes of *MCL §§600.2945(e)* and *2947(2),* a product users' disregard of safety warnings, training and instructions is not *per se* misuse. Again, the unambiguous language chose by the Michigan Legislature as a matter of public policy clearly states otherwise. The majority was obligated to enforce this statutory language as written. *Harris, supra; Gardner, supra; Aroma Wines & Equip, supra; Ligons, supra; Lesner, supra; Roberts, supra; McIntire, supra.* Indeed, to accept the majority's construction would be to improperly negate or eviscerate an entire phrase within the statutory definition of "misuse" devoted to actions "contrary to a warning or instruction…regarding the use or maintenance of the product". *MCL §8.3a; Gardner, supra; McCahan, supra.*

The majority attempted to justify its construction of the term "misuse" by noting that definition employed by the Legislature did not recognize or allow for consideration of "any minimal level of egregiousness" on the part of the product user. However, when amending *MCL §§600.2945(e)* and *2947(2)* in the fashion it did, the Michigan Legislature deliberately replaced an affirmative defense allowing for consideration of comparative fault on the part of an injured product user with an absolute defense premised upon misuse, as defined, and without exception. Again, this remedial legislation must be enforced in a manner designed to enforce the Legislatures intent to strengthen the tort reform protections afforded to product manufacturers under Michigan's Revised Judicature Act. *Huron Twp, supra; Sam, supra; Bonifas, supra; Chandler, supra; Simkius, supra; Plymouth, supra.*

The majority also committed clear and reversible error with its construction and application of the terms "reasonably foreseeable".

Because *MCL §600.2945, et seq* does not contain a definition of "reasonably foreseeable", the Michigan Legislature is entitled to assume that the Michigan courts will construe this legal term of art in a manner consistent with the traditional and accepted common law meaning of the term. *Nummer, supra; Couch, supra.* However, in this case, the majority utterly ignored the established common law definition of "reasonably foreseeable" in the specific context of product misuse, holding, instead, that product user's decision to disobey instructions, warnings, training and other safety communications is neither *per se* unreasonable nor unforeseeable.

The majority went on to craft a new test for "reasonably foreseeable" product misuse derived from the distinction made under Michigan criminal law between ordinary and gross negligence. Specifically, the majority held that, as a matter of law, ordinary negligence on the part of product users is *per se* foreseeable while gross negligence is not.

The majority's action here patently violates the legal principle which forbids Michigan courts from reading language into or graphing language unto an otherwise plain and unambiguous statutory language. *Harris, supra; Roberts, supra.*

Moreover, the Michigan Legislature clearly did not intend to tie the test for the foreseeable product misuse to the concept of gross negligence. The term "gross negligence" is defined separately from "misuse" in Legislature's own products liability glossary and there is no reference to or incorporation of the term "gross negligence" in any the sections devoted to the statutory product misuse defense of the remedial Product Liability Statute. *MCL §600.2945(d)(e).* See also: *MCL §600.2947(2).*

Essentially, the majority opinion is an improper judicial exercise in second-guessing the wisdom of the policy reasons behind the Michigan Legislature's creation of an absolute

legal defense to claims against manufacturers arising out of unforeseeable product misuse via enactment of *1995 PA 249, MCL §600.2945(e)* and *MCL §600.2947(2).* As such, the opinion fails to honor the Michigan Legislature's status as an equal branch of government upon which the State Constitution has delegated the responsibility for formulating public policy in all areas including the desired levels of products liability tort reform. *Harris, supra; Ligons, supra; Lesner, surpa; McIntire, supra.*

The Defendant respectfully submits that Supreme Court intervention is absolutely necessary to re-establish the proper deference owed to the Legislature by Michigan courts and to majority panel's numerous legal errors.

Conclusion

The Defendant Dieffenbacher submits that Supreme Court review of the statutory language at issue is necessary to resolve the existing conflict among the Court of Appeals' panels and to announce a definitive test regarding proper judicial construction and application of the product misuse defense set forth under *MCL §600.2945(e)* and *MCL §600.2947(2).* Proper judicial construction of this tort reform legislation is of major significance to the state's jurisprudence and Supreme Court action will provide crucial guidance to the Michigan bench, bar and product litigants.

Additionally, Supreme Court intervention in this case is warranted in order to correct the numerous and severe violations of principles of statutory construction appearing in the Court of Appeals' majority opinion. It is surely incumbent upon the Supreme Court to insure that all Michigan courts exhibit proper respect for and deference to the Michigan Legislature, especially in areas of public policy such as tort reform legislation.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated, the Defendant-Appellant Dieffenbacher respectfully requests the Supreme Court to grant its Application for Leave and reverse and vacate the Court of Appeals' majority opinion dated July 19, 2016. This relief can be awarded peremptorily or following further argument and/or briefing on the merits.

By: /s/ Michelle A. Thomas

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EXHIBIT LIST

Ex. 1: **Deposition of Plaintiff Steven Iliades**
Ex. 2: **Deposition of Ronald Dzierzawski**
Ex. 3: **Deposition of Joe Whiteside**
Ex. 4: **James Michalak Deposition Exhibit (Photo of Press No. 25)**
Ex. 5: **Affidavit of Marius Brumaru**
Ex. 6: **Deposition of James Michalak**
Ex. 7: **Deposition of Marius Brumaru**
Ex. 8: **Deposition of Jon Ver Halen**
Ex. 9: **Deposition of Rodolfo Mejia**
Ex. 10: **Rodolfo Mejia Dep Exhibit Press No. 25 – Light Curtain Housing Units**
Ex. 11: **Deposition of Charles Green**
Ex. 12: **Deposition of Kenneth Richter**
Ex. 13: **Kenneth Richter Deposition Exhibits (Consultation Reports)**
Ex. 14: **Jon Ver Halen Deposition Exhibits (Climbing Part Way Inside)**
Ex. 15: **Deposition of Ralph Barnett**
Ex. 16: **Ralph Barnett Deposition Exhibit**
Ex. 17: **Ralph Barnett Affidavit**
Ex. 18: **Order on Motions in Limine July 23, 2014**
Ex. 19: **Defendant's Answers to 1st Set of Interrogatories**
Ex. 20: **Defendant's Answers to Expert Witness Interrogatories**
Ex. 21: **Defendant's Motions in Limine**
Ex. 22: **Trial Court Order on July 9, 2014**
Ex. 23: **Deposition of James Preston**
Ex. 24: **Marius Brumaru Deposition Exhibit**
Ex. 25: **1978 PA 495**
Ex. 26: **Bill Analyses 6-30-78**
Ex. 27: **Bill Analyses 12-7-77**
Ex. 28: ***VanEizenga v. Straley***
Ex. 29: **1995-SFA-0344-S**
Ex. 30: **1995-SFA-0344-A**
Ex. 31: **1995-SFA-0344-E**
Ex. 32: ***Citizens Ins Co v. Prof I Temperature Heating***
Ex. 33: ***Walton v. Miller***
Ex. 34: ***Fjolla v Nacco Materials Handling Group***
Ex. 35: ***Davila-Martinez v Brinks Guarding Servs***